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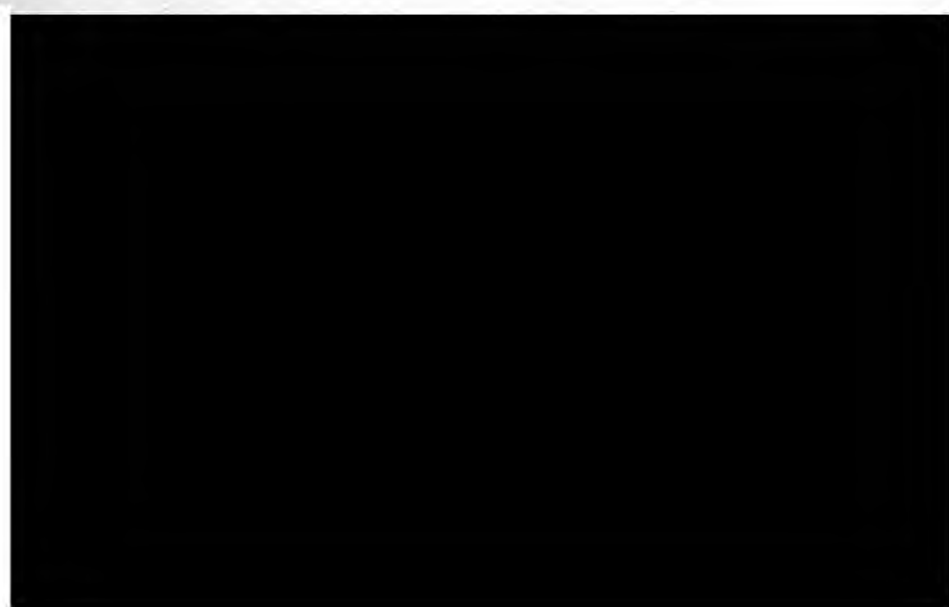
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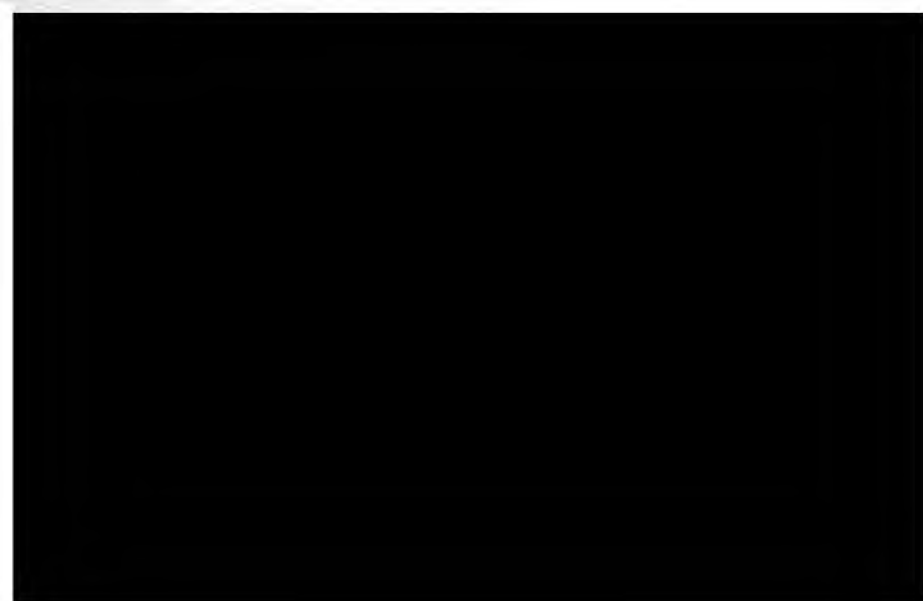
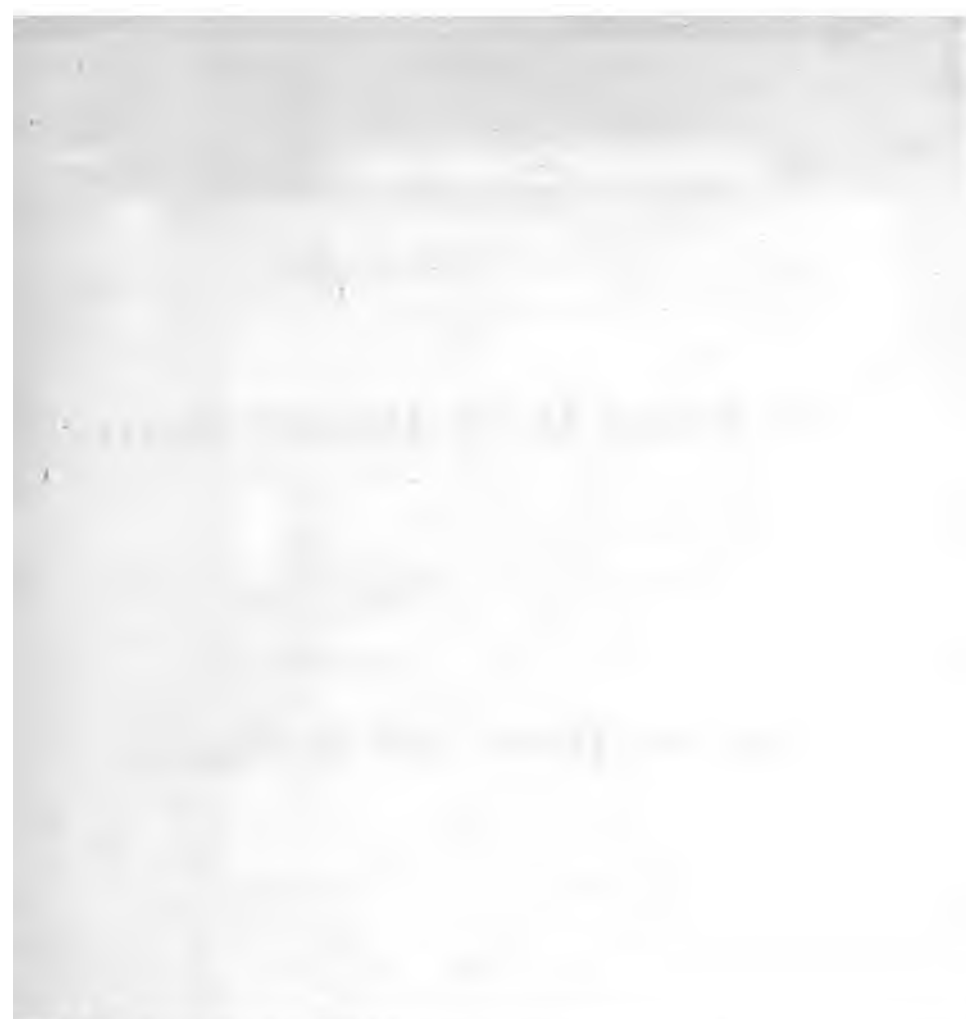
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The King's Bench Practice Court;

WITH THE

POINTS OF PRACTICE

DECIDED IN THE COURTS OF

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FROM

EASTER TERM, 1833, to TRIN. TERM, 1834.



BY

ALFRED S. DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.



VOL. II.

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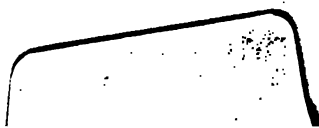
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REPORTS OF CASES
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REPORTS OF CASES
DETERMINED ON
POINTS OF PRACTICE.

COURT OF EXCHEQUER.

Easter Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

PRICE *v.* BOWER.

1833.

GODSON applied for a *distringas*. Four attempts had been made to serve the defendant by calling at his house, and, on each occasion, a copy was left. The answer was, that he was not at home, and that it was not known when he would be. Inquiries had been made of two persons about the place, (whose names were not mentioned), and who stated that the defendant kept out of the way. This, deponent said, he believed to be true.

To found an application for a *distringas*, it must be shewn that the defendant is at home or in the neighbourhood during the time that the party calls to serve him.

BAYLEY, B.—That is not enough; it must be shewn from the answers given, or otherwise, that the defendant is at home or in the neighbourhood during the time you go.

Rule refused.

1833.

CANTELOW v. TRUEMAN.

Where a defendant, being in custody on mesne process, was discharged on the terms of his giving bills, which he neglected to do, and the plaintiff arrested him again without a fresh affidavit or a Judge's order, the second arrest was held to be regular.

ARCHBOLD obtained a rule *nisi* for discharging the defendant out of custody, on the ground of his having been irregularly arrested a second time for the same cause of action, and that the plaintiff should pay the costs. Against which—

W. H. Watson shewed cause.—The defendant was first arrested on the 16th of *March*; and a person of the name of *Church* applied to the plaintiff to let the defendant out of custody, and promised to get the acceptances of a Mr. *Harrison* for the amount, by post; the plaintiff, in consequence, agreed to discharge the defendant, and he was let out of custody: no bills, however, were given, and afterwards the defendant called and begged for time. Ultimately he was arrested again on the 6th of *April*. All these circumstances were stated before *Gurney, B.*, on a summons taken out to discharge the defendant; but the learned Judge refused to do so. The defendant was only discharged on the terms of giving bills, which he neglected to do. There was no precise time for giving them, but we waited a reasonable time. He cited *Puckford v. Max-*

suit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge. This is a sort of discontinuance; any Judge would have granted an order *ex parte*, and the plaintiff ought to have applied to one.

1833.
CANTELOW
v.
TRUEMAN.

BAYLEY, B.—This case is not within the rule: here is neither a *nonpros*, nonsuit, nor discontinuance. That rule only applies where the plaintiff is in default. Here, he has been deluded; he is in no fault, but he has been drawn in. The defendant is in fault.

VAUGHAN, B.—An arrest a second time on the same affidavit was held regular in *Penfold v. Maxwell*.

GURNEY, B.—The rule certainly does not apply to this case, where the defendant was only let out of custody from a motive of kindness, and on a condition which he never performed.

Rule discharged, with costs.

CASH v. COCK.

THE defendant *Cock* was sued on an agreement, and judgment was signed against him for want of a plea. The Court set aside that judgment, on the terms of the defendant admitting the agreement. That rule was made absolute on the 13th of *June* last, but it was afterwards discovered that the defendant had died on the 3rd. In *Michaelmas* Term, the plaintiff obtained a rule to set aside

Where judgment was signed against a defendant, which was afterwards set aside on the terms of paying costs; but the defendant having died before the rule was made absolute, the plaintiff got set aside all proceedings subsequent to the declaration, on payment of costs, except those of the rule to rescind.

that rule set aside, and commenced an action of *sci. fa.* on the judgment; the Court allowed the administrator to come in and defend in the name of the original defendant, and set aside all proceedings subsequent to the declaration, on payment of costs, except those of the rule to rescind.


1833.

CASH
v.
COCK.

the last rule, which was made absolute in *Hilary* Term; and the plaintiff subsequently commenced an action of *scire facias* on the judgment. The defendant, by his will, appointed four persons executors, two of whom were in *Barbadoes*, and one in *Scotland*; they all renounced, and administration was taken out by two sisters, in *February*.

Jeremy, under these circumstances, obtained a rule *nisi* on behalf of the administratrixes, calling on the plaintiff to shew cause why the last rule of Court should not be rescinded, and all proceedings subsequent to the declaration set aside, they undertaking not to take advantage of the death of the defendant, and to admit what the defendant had before undertaken to admit.

Wightman shewed cause.—The defendant, in his lifetime, obtained a rule to set aside the judgment on payment of costs; but they were not paid. The judgment was obtained more than a year ago. The Court will not allow such a motion, except on the terms of their pleading to merits, and not taking advantage of the statute of limitations or want of assets, and paying all the costs.



1833.

The KING *v.* The Sheriff of MIDDLESEX, in DUNCOMBE *v.*
CRISP.

ERLE shewed cause against a rule which had been obtained by *Price* for setting aside an attachment against the sheriff for irregularity. The defendant was arrested on a *quo minus*, returnable on the 15th of *April*. The defendant gave a bail-bond to the sheriff of *Middlesex*; on the 18th the plaintiff declared conditionally. Special bail was put in on the 19th; the bail-piece was filed at the *Exchequer-office*, and notice of bail served on the plaintiff's attorney. The notice of bail stated the names of the bail, and the streets in which they lived, but did not give their residences for six months, nor describe them as housekeepers or freeholders. The plaintiff, treating the notice as a nullity, ruled the sheriff on the 19th to bring in the body. Notice of taxation was given, and on the 29th costs were taxed. The attachment was returnable on *April* 30th. The rule for setting aside the attachment was moved for on the 1st of *May*.

Where the notice of bail omitted to state the residences of the bail for six months, and whether they were housekeepers or freeholders:—*Held*, that this was not such a defect as entitled the plaintiff to treat it as a nullity, and an attachment against the sheriff was set aside.

Where, on moving to set aside proceedings for irregularity, the rule does not pray for costs, the Court cannot give them.

Erle contended that the attachment was regular.—No such notice of bail was given as is required by the rule of Court (a), and the plaintiff was, therefore, right in treating it as a nullity. The notice was defective in a most material particular. But, if the notice can be considered as irregular only, then this application is too early, for, we are still in time to except. They have also allowed three or four different steps to be taken by us instead of moving to set aside the attachment in the first instance.

BAYLEY, B.—You were not bound to except unless you chose; and you can except now if you are in time: but

(a) Reg. Gen. T. T. 1 Will. 4, s. 2; *ante*, Vol. 1, p. 103.

1833.
 The KING
 v.
 The Sheriff of
 MIDDLESEX.

there is no authority to shew that such a notice may be treated as a nullity; it is irregular, and liable to be vacated; but the defect should have been pointed out to the defendant. Bail were put in in due time; there was no exception, and they were not bound to justify unless you excepted; neither had you any right to move for an attachment till the time for justification had expired. The rule must be absolute (a).

Price applied for the costs of the motion.—The motion was, why the attachment should not be set aside on notice being given. His affidavit, he said, shewed not only an irregularity, but that the affidavits on the other side were untrue.

BAYLEY, B.—If the rule had prayed for costs, it would have been absolute with costs. We cannot give you more than you ask. You asked all that was prudent. If the costs had been asked for they would have been in the rule. I consider it as the clear and settled practice of the Court, that we cannot give more than has been asked for. Where a party asks to set aside proceedings for irregularity no costs are given.

1833.

WADDINGTON v. PALMER.

PAYNE moved for a *distringas*. Six attempts had been made during six weeks to serve the defendant, by calling at the house where he lived. Sometimes the answer was, that he was out of town, at other times, that he was very seldom there, that he would be back in a fortnight, &c. A copy was left and the writ explained, and notice given that a *distringas* would be moved for.

Six calls to serve a writ on a defendant, and the only answer obtained was, that he was out of town:—*Held*, not sufficient to get a *distringas*.

Per Curiam.—That will not do; from first to last he is said to be in the country.

Rule refused.

BROOK and Another v. COLEMAN.

IN this action, *Gaselee, J.*, had made an order, that, on entering a common appearance, the bail-bond should be delivered up to be cancelled, unless the Court of *Exchequer* should otherwise order, and then the defendant should have six days' time to put in bail. The affidavit on which the defendant was arrested, was in this form—" *J. W.*, of &c., maketh oath and saith, that *Eleanor Coleman* is justly and truly indebted to — *Brook* and — *Watson*, as assignees of the estate and effects of —, a bankrupt, in 51*l.* 9*s.*, upon and by virtue of a certain bill of exchange, drawn by the said bankrupt antecedently to the *fiat* of bankruptcy issued against him, upon and accepted by the said *E. Coleman*, payable two months after date, and now remaining due and unpaid." The objection to the affidavit was, that the amount for which the bill was drawn was not specified, nor the date, nor to whom payable. The plaintiffs were assignees of the bankrupt.

An affidavit of debt on a bill of exchange not stating the amount for which the bill was drawn:—*Held*, bad.

1833.
BROOK
v.
COLEMAN.

Erle obtained a rule *nisi* to set aside the learned Judge's order, and cited *Hanley v. Morgan* (a), and *Lewis v. Gompertz* (b), in which the same objection as to the amount not being stated existed, but was not insisted on by counsel. There is no authority that the date is, or is not, necessary to be stated.

BAYLEY, B.—The word “residue” has been held to do away with the necessity of stating the amount.

Kelly shewed cause.—The affidavit must shew sufficient matter to satisfy the Court that there is such a debt as that sworn to. The affidavit must stand on its own merits. The arrest can only be for the principal and not for the interest, unless expressly reserved on the bill.

BAYLEY, B.—I do not know that: you cannot sue out a commission of bankrupt, unless the debt without interest amounts to 100*l*(c). Interest does not begin to run until the bill is dishonoured, then it becomes part of the damages; but if interest is specified on the bill, then it carries interest from the date.

Kelly.—The custom of merchants makes interest pay-



Newcomb (a), Lamb v. Edwards (b), Bradshaw v. Saddington (c). It has not been decided that the plaintiff is bound to shew his title to the bill.

1833.
 }
 BROOK
 v.
 COLEMAN.

BAYLEY, B.—It was a long period of time before this point was noticed. If the interest is only part of the damages, and the party swears to being “indebted,” that must refer to the debt and not to the damages. We will consult the Judges of the other Courts.

On a subsequent day, his Lordship said he had conferred with the Judges of the other Courts, and they were of opinion that the amount must be specified.

Rule discharged.

(a) 5 J. B. Moore, 14; S. C.
 2 Brod. & B. 343.

(b) Ibid.
 (c) 7 East, 94.

SCARBOROUGH v. EVANS.

MANSEL applied for leave to enter an appearance for the defendant. A *distringas* had been obtained and had been returned *nulla bona*. The affidavit stated that three attempts had been made to execute the *distringas* at the defendant's *present or late* place of abode.

Where the defendant cannot be served personally with the summons or *distringas*, the Court will not allow an appearance to be entered, unless the affidavit is strictly accurate, and it is shewn that no reasonable means have been left untried to serve the defendant.

Per Curiam.—The affidavit is insufficient in not stating that you have endeavoured to serve the defendant at his present place of abode. You do not negative a knowledge of any other place of abode, nor do you state that you cannot find him. You ought to state the grounds for believing that he cannot be found. This is an *ex parte* proceeding, and, therefore, the affidavit ought to be strictly accurate.

Rule refused.

1833.


HILL v. MOULE.

To obtain a *distringas*, the copy must be left at the last time of calling.


PETERSDORFF moved for a *distringas*. The affidavit stated that a copy was left at the second time of calling.

BAYLEY, B., said, he thought it should be the last time, but that he would mention it to the Court. On a subsequent day—

LYNDHURST, C. B., said, that all the Judges had conferred together on the point, and they were all of opinion that the copy should be left at the last time of calling. He observed, that the defendant having eight days to appear, it was calculated to mislead him if the copy was left the first or second time. The eight days were to be reckoned from the last time of calling, and the object of calling was, to see whether the party kept out of the way.

Rule refused.

On a subsequent day, on motions by Mr. *Godson* and Mr. *Price*, for *distringases*, the Court refused them on the same ground.



that the defendant was not yet returned. It was sworn that the defendant had gone over to *France*, and was staying there for the purpose of avoiding the demands of his creditors. [Lord *Lyndhurst*, C. B.—What are the grounds stated for that conclusion?] None: but the fact is positively sworn to; and unless we get a *distringas*, we are without remedy.

1833.
 SIMPSON
 v.
 Lord GRAVES.

Per Curiam.—We cannot grant the rule. The circumstances must be stated, to satisfy the Court that he keeps out of the way to avoid being served.

COOK v. ROBERT ALLEN.

THIS was a motion on behalf of the sheriff of *Suffolk*, calling on *Cook*, the plaintiff in the action, and *Joseph Allen*, to appear and interplead as the Court might direct. The affidavit upon which the rule was moved stated, that, on the 8th *December*, a *feri facias*, returnable on the 11th of *January*, was sent to the sheriff, commanding him to take the goods of *Robert Allen*, to answer a debt due to the plaintiff *Cook*; that, in pursuance of the writ, the sheriff seized goods which appeared to be the property of the defendant, and that the sheriff was then in possession of them, and that they remained unsold; and that *Joseph Allen* claimed them as his property by virtue of a bill of sale of 13th of *May*, 1832, and had required the sheriff to give up the goods; and that the sheriff expected to be ruled to return the writ.

A sheriff, who applies to the Court for relief under the interpleader act, must come as soon as possible. Where goods were taken in execution by a sheriff, and a claim being made to them, the sheriff was prevented from applying by a rule obtained by the defendant in the action for setting aside the proceedings for irregularity, which rule was not disposed of till the 23rd of *January*, when it was discharged:—*Held*, that the sheriff was too late in applying on the 31st of

John Jervis shewed cause on behalf of *Joseph Allen*;

January, though the sheriff was in *Suffolk*, and the affidavit was sworn there on the 30th.

Where there is delay or any circumstance to be accounted for, the sheriff must make a special affidavit stating the facts; and no supplemental affidavit will be allowed.

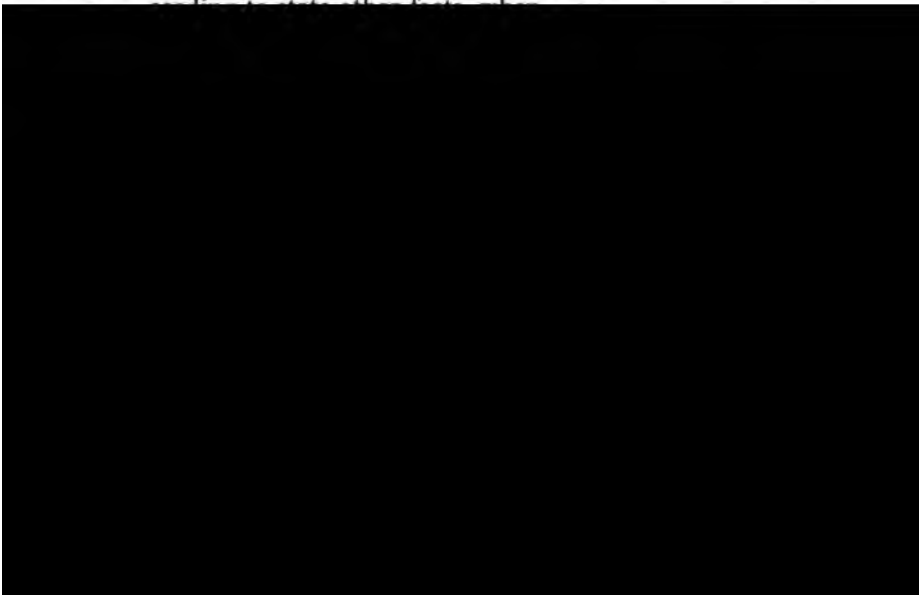
Semble, that the sheriff applying under this act ought to deny collusion.

1833.

COOK
v.
ALLEN.

and *W. H. Watson* for the execution creditor. They contended that the sheriff was too late in his application; and that, unless he came promptly, he was not entitled to the protection of the act. The application was not made till *January 31st* (the last day of *Hilary Term*), and the writ came to the sheriff's hands on *December 8th*. They also produced long affidavits; and endeavoured to shew some misconduct on the part of the sheriff, but did not succeed.

S. Hughes appeared for the sheriff. He said, that, when it was explained how the time had been occupied, it would appear that there had been no laches on the part of the sheriff. The goods were seized on the *10th* of *December*; on the *15th*, notice of the bill of sale to *Joseph Allen* was served on the sheriff; on the *18th*, *Robert Allen* (the defendant in the action), obtained a Judge's order staying proceedings till the *4th* day of *Hilary Term*, to give him time to move to set aside the judgment and execution for irregularity. This was served on the sheriff on the *19th*; that motion was accordingly made in *Hilary Term*, and was not ultimately disposed of till the *23rd* of *January*, when the rule was discharged (*a*). He was pro-



the other side. He offered to produce a supplemental affidavit of the facts he had stated, and of the further facts—that the sheriff did not know of the rule being disposed of till the 26th of *January*, when he received a letter from the plaintiff to that effect; that the defendant's attorney, who was also the attorney for the person claiming under the bill of sale, had promised to acquaint the sheriff with the result of the motion, but had neglected to do so; that the sheriff, on being written to on the 26th by the plaintiff, and required to go on with the execution, proceeded to make preparations for selling the goods; but, on the 30th, he received a letter from the attorney for *Joseph Allen*, reminding him of the claim made by him under the bill of sale; and that he asked for an indemnity, but the attorney refused to give it. The sheriff till then supposed that *Joseph Allen* had abandoned his claim, his attorney not having written to the sheriff as he had promised, and there being good grounds to suppose the bill of sale to be fraudulent, *Joseph Allen* being a brother of the defendant and employing the same attorney, and being also very poor, and unable to lend the sum for which it was alleged the bill of sale was given, and *Robert Allen* being allowed to continue in possession. These, he said, were the real facts of the case. If the Court would not allow a supplemental affidavit to be made, he contended, that the fact of the motion in *Hilary* Term being made to set aside the proceedings in the action could be known by reference to the officers, when it would appear that it was not disposed of till the 23rd of *January*, and, excluding that day and the day of making the affidavit, which was sworn on the 30th, and had to be sent to Town from *Suffolk*, there were only six days; and he submitted that that could not be considered such an unreasonable delay on the part of the sheriff, as to disentitle him to relief under the act, which was remedial in its nature, and ought to be construed liberally; and that the sheriff, if he had applied before the rule was disposed of,

1833.

COOK
v.
ALLEN.

1833.

COOK

v.

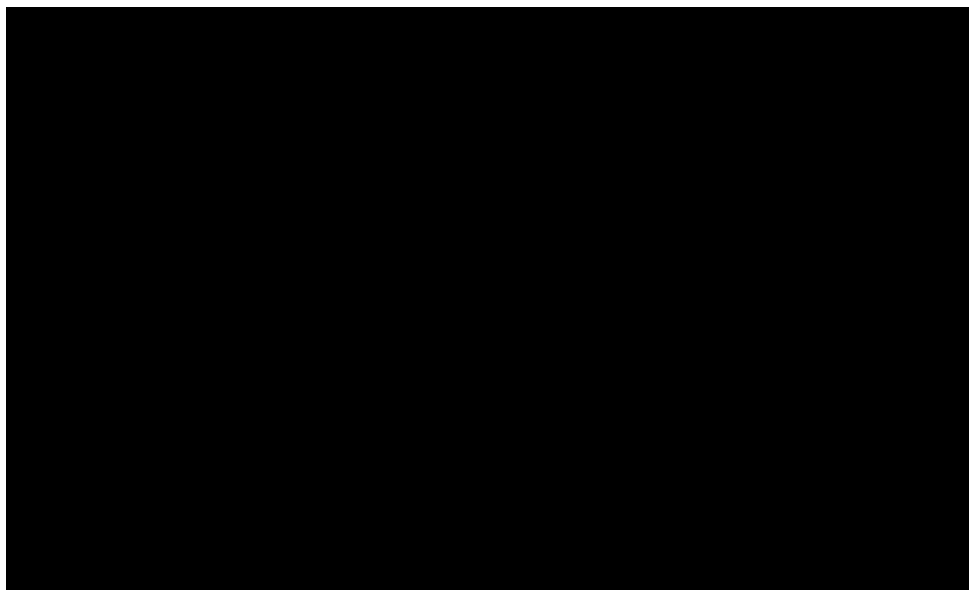
ALLEN.

would have been told he had come too soon and unnecessarily.

Per Curiam.—(Having inquired of the officer, who referred to his book, from which it appeared that the rule was not discharged till *January 23rd.*)—We cannot allow a supplemental affidavit; the sheriff should have come prepared in the first instance with an affidavit accounting for the delay. If the sheriff could not come at once to the Court, but was delayed by the rule, it was his duty to have watched the rule, and have come within four days after it was discharged; that would have enabled the other parties to appear in the same term. If the sheriff will come with such a general affidavit, he puts himself at the mercy of the affidavits which may be produced on the other side.

BAYLEY, B.—It is not at all clear that the sheriff ought not to deny collusion; and I think the sheriff ought to pay the costs.

Rule discharged, with costs.



defendant having been arrested for more than was found to be due, the plaintiff by that act was not entitled to his costs, and that the Court had no discretion, the act being imperative. He cited *Day v. Picton* (a), and *Donlan v. Brett* (b).

1833.

ROPER
v.
SHEVELY.

Per Curiam.—This act has never received such a construction as is now contended for. The question always has been, whether there was reasonable or probable cause. It is clear here that there was. The plaintiff was ignorant of any part of the goods being returned; and the defendant, on the first application, said he would look into the account; but he does not appear to have made any objection to the plaintiff that he had charged improperly for the urn. The defendant is bound to make out a want of reasonable or probable cause; and if he had advertised the plaintiff of the return of the urn, and had then been arrested, that might have shewn a want of reasonable cause. In the cases cited, the Court thought there was no reasonable ground to arrest. Under the discretion which the act gives to the Court, we think there is no pretence for the motion.

Rule refused.

(a) 5 M. & R. 31; S. C. 10 B. & C. 120.

(b) 5 M. & R. 29; S. C. 10 B. & C. 117.

FARRELL v. DALE.

COWLING moved to make absolute a rule to compute on a bill of exchange. The affidavit stated that the rule *nisi* had been served on the defendant at *York*, but it was on the day cause was to have been shewn. Ten days, how-
 A rule *nisi* to compute, served at *York* on the day cause was to be shewn, is insufficient to authorize making the rule absolute, although ten days have elapsed since the service.

1833.
 FARRELL
 v.
 DALE.

ever, had now elapsed; and, as cause was never shewn till the day after the day named on the rule, he submitted that the Court might grant the rule.

GURNEY, B. (a)—Parties who are guilty of such negligence ought to suffer for it. The rule may be enlarged for a week, and there must be fresh service.

Rule accordingly.

(a) The only judge in Court.

HILDYARD v. BAKER.

The Court cannot enlarge the return of a writ by altering it to a later day: *semble*, not even with consent of plaintiff.

TYRWHITT applied on behalf of the sheriff of *Middlesex*, to enlarge the return to a writ of *elegit* to the last day of term. The writ was delivered to the sheriff on the 3rd of *April*, returnable on the 15th. The goods were seized on the 6th; but it was represented to the sheriff that the action would probably be settled; and, under that impression, he allowed the time for the return to expire.

1833.

TOMLINSON and Another, Executors, *v.* NANNY, Clerk.

THIS was an action of *assumpsit* by the plaintiffs as executors. The declaration contained counts on promises to the testator, and also a count on an account stated by the defendant with the plaintiffs, as executors, of money due to the plaintiffs as executors, and a promise to pay to them as executors. The defendant pleaded the general issue and the statute of limitations, and paid a sum of money into Court generally. A summons had been taken out before the Judge at the assizes, to strike out the last count where the promise was laid to the plaintiffs as executors; but the learned Judge refused the order. At the trial the plaintiffs failed in proving that more was due by the defendant, within the period of six years, than was covered by the sum paid into Court, and the defendant had a verdict. There was no evidence of any liability of the defendant to the plaintiffs as executors.

It is too late to strike out counts on promises to the plaintiffs as executors, after the cause has been taken down to trial at the assizes.

Cottingham now moved for a rule to shew cause why the count on the account stated with the plaintiffs as executors should not be struck out of the declaration, with the view of preventing the plaintiff from being charged personally with the costs. The attorney swore that he knew nothing of that count being in the declaration till the time of the application to the Judge at the assizes.

LORD LYNDHURST, C. B.—You made your election when you drew the declaration; by introducing that count you probably alarmed the defendant very much; it was too late therefore to apply at the assizes, and you are too late now. The attorney ought to have known what counts the declaration contained.

Rule refused.

1833.

CORNISH v. KING.

Where the defendant resides in ready furnished lodgings, the Court will not allow an appearance to be entered for him upon a return of *nulla bona* and *non est inventus*, to a *distringas*, unless it is sworn that the defendant has no goods on which the sheriff can levy.

BALL moved on behalf of the plaintiff in this action for leave to enter an appearance for the defendant under s. 3, of the 2 Will. 4, c. 39 (a). The affidavit of the officer to whom the sheriff's warrant on the *distringas* was given, stated that he had attended several times at the defendant's residence, and each time left a copy of the *distringas*; but the answer was, that the defendant was not within, and he was further told, that there was nothing there of the defendant's to take, as the lodgings were let to him ready furnished. The affidavit further stated that *nulla bona* and *non est inventus* had been returned; and that, since the issuing of the writ, an offer had been made to pay five shillings in the pound; and also, that a clerk of some attornies had applied for copies of the summons, &c., but refused to undertake to appear.

BAYLEY, B.—Your affidavit must be amended, by adding that the defendant has no effects elsewhere that can be taken, and then you my have your rule.

demand stated the goods to have been delivered at various times, between the 1st of *October*, 1831, and *September*, 1832. There was no proof of any goods having been sold or delivered during that period; but there was proof of goods having been sold and delivered in *May* and *June*, 1831. It was objected that the plaintiff could not recover for those latter goods, inasmuch as they were not covered by the particulars. The defendant, however, called a witness to disprove the plaintiff's case. A rule *nisi* having been obtained to set aside the verdict for the plaintiff, and to enter a nonsuit upon the objection taken at the trial—

1833.
GREEN
v.
CLARK.

Hutchinson shewed cause.

Mansel supported the rule.

PER CURIAM.—There were no other dealings proved than those in *May* and *June*, and therefore the particulars must be supposed to have referred to them. It is not pretended there was surprise; and, if the defendant was not misled, there was no ground for a nonsuit.

Rule discharged.

OKILL's Bail.

THE affidavit of justification in this case stated, that the bail was a housekeeper residing at &c., and was *possessed* of certain property, to wit, of &c., over and above his just debts, and any other sum for which he was bail; and that his property consisted of stock in his trade of &c.

The affidavit of justification must agree with the form: it is not sufficient that it is equivalent.

Upon an objection to the affidavit, that the bail only swore to possession—

Addison endeavoured to support the affidavit, contending that, taking it altogether, the bail swearing that his

1833.

OKILL's Bail.

property consisted of stock *in his trade*, it sufficiently appeared that he was *worth* that property; and that the possession was not merely colourable.

GURNEY, B.—The form must be adhered to; a great deal of time will otherwise be occupied in every case in discussing whether what is said is equivalent to what ought to have been said.

Time was given to amend.

PIGGOTT v. KEMP.

A rule for a new trial having been moved for by mistake in a wrong Court, and the mistake not having been discovered till after the first four days of the term had elapsed, the Court, under the circumstances, allowed the motion to stand.

ON the fourth day of the term, the Court of *King's Bench*, on the motion of *Kelly*, for the defendant, had granted a rule *nisi* for a new trial in this cause on two grounds. On the next day, it was discovered that the action had been brought in the *Exchequer*, and thereupon—

Kelly applied to this Court for a new trial on the same grounds; and he submitted, that, though the motion was not made in this Court within the first four days, as it ought to have been, yet, as a motion had in fact been made

1833.

CLIFFE v. PROSSER.

FOLLETT shewed cause, against a rule which had been obtained by *Richards*, for referring back to the Master the bill of costs of Mr. *France*, the plaintiff's attorney, and for reviewing his taxation, and for striking out certain items therein. The plaintiff, it appeared, was the administratrix of a Mr. *Cliffe*, who had granted a lease to the defendant, and, after Mr. *Cliffe's* death, the rent being in arrear, the plaintiff employed Mr. *France*, as her attorney, to take proceedings against the defendant. He accordingly commenced an action in *assumpsit*; and after it had proceeded some way it was discovered that there was a lease under seal; it became therefore necessary to commence a new action, and the former proceedings were entirely useless; the Master, who called in Mr. *Collett* to his assistance, had allowed the costs of the former proceedings in *assumpsit*. It was sworn on the part of Mr. *France*, that he knew nothing of the lease, and that the plaintiff had never mentioned it to him: but, on the other side, it was contended, he must, or ought to have known of it, and that it was his mistake to bring *assumpsit* instead of covenant. Mr. *France* had succeeded to a business, and the lease was prepared in the time of his predecessor, but in the same office. It was now contended that the mistake on the part of Mr. *France* was sufficiently accounted for, and that there was not such gross negligence as to deprive him of his right to recover those costs, and unless it was a very clear case the Court would not interfere.

Where there appears to be negligence or ignorance of law on the part of an attorney, which creates unnecessary costs, the Court will order those costs to be disallowed on taxation, without prejudicing his right to bring an action for them.

Affidavits used before the Master on the taxation of costs, cannot be read on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is not sufficient.

The Court, however, said there were authorities to shew that ignorance of law is *crassa negligentia*; and they made the rule absolute for striking out the items objected to,

1833.
 CLIFFE
 v.
 PROSSER.

but without prejudice to the right of Mr. *France* to bring an action to recover them.

This case was partly heard on a former day; but, on that occasion, *Richards* objected to certain affidavits being read by *Follett*; they had been read before the Master, but were not referred to in the rule, though notice had been given that they would be used on shewing cause, and also the lease referred to: but

BAYLEY, B. saying, that he thought the notice was not sufficient, and that the rule *nisi* should also have referred to them—the rule was allowed to be enlarged, on payment of the costs of the day.

TONKS v. FISHER.

After time to plead on the usual terms, the Court will not allow the venue to be changed, except on special grounds.

WILLMORE shewed cause against a rule for changing the venue from *London* to *Warwickshire*; the declaration being in *assumpsit* on the money counts.

BAYLEY, B.—It ought to have been absolute in the first

principle that the venue cannot be changed after time given to plead on the usual terms, and taking short notice of trial.

1833.
TONKS
v.
FISHER.

Alexander.—My affidavit states that the cause of action arose in *Warwickshire*, and that all the witnesses live in *Warwickshire*.

BAYLEY, B.—You do not say that there are any.

Alexander.—The only question is, whether we are precluded by the terms given.

Per Curiam.—The rule must be discharged.

Rule discharged, with costs.

ERLE v. WYNNE.

J. JERVIS obtained a rule *nisi* under the 43 *Geo. 3*, c. 46, s. 3, that the defendant should have his costs, he having been arrested for 28*l.* and upwards, and the verdict being for 5*l.* only.

Where the plaintiff recovers a less sum than that for which he arrests the defendant, and a motion is made to give the defendant his costs under the 43 *Geo. 3*, c. 46, the Court will take into their consideration the way in which the debt was contracted: and, therefore, where the debt sued for was for beer supplied to a person who was habitually drunk, and the Court thought the plaintiff was not entitled to

Cottingham shewed cause.—This was an action for beer supplied to the defendant, and was tried at *Chester* at the *Lent* Assizes, before Mr. Baron *Bayley*. This motion cannot be maintained, unless there is an absence of all reasonable and probable cause. There can be no doubt that the quantity of beer was delivered: it was proved by three witnesses. One part of the amount was for beer delivered from *October* to *December*, to the amount of 16*l.*, and the remainder between *January* and *March*; it was also proved that the accounts had been frequently delivered, and though


recover it:—*Held*, that this was a case of want of probable cause within the meaning of the act, though the beer was proved to have been delivered.

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ERLE
v.
WYNNE.

the defendant now denies it; he never disputed the amount, and on one occasion, he said he would try and get some money by the sale of some property. The plaintiff is a poor man, and keeps a beer shop; but it is objected that the defendant got drunk at the plaintiff's house, and was in the habit of meeting other people; but the plaintiff ought not to suffer for the defendant's misconduct. The plaintiff frequently remonstrated with him about drinking so much. The learned Judge told the jury he thought they ought not to give credit for the beer supplied whilst he was drunk; and the jury gave only 5*l.*, but the debt had not been before disputed; the defendant had some property of his own, and had offered to pay the plaintiff 20*l.*, without costs, and to let a tenant of his pay his rent to the plaintiff; and when the plaintiff had acceded to this arrangement, and had desired his attorney not to proceed further, the defendant's attorney said he should not do it. The plaintiff has already suffered by losing his debt, but it cannot be said that he had no reasonable or probable cause for arresting the defendant.

J. Jervis.—It was proved that the defendant was charged with thirty-six quarts of beer in one day. The defendant



was satisfied. The supply was improperly made, and I think this may have a very beneficial effect.

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VAUGHAN, B.—I think the defendant ought to have his costs. The plaintiff had no reasonable ground. The ale was supplied when it ought not to have been, and the plaintiff, therefore, not being entitled to recover for it, ought not to have sued him for it. The defendant has no means of judging whether he was supplied with the quantity charged. The jury thought he had been charged with too much.

BOLLAND, B.—No jury could sanction such a proceeding.

Rule absolute, and no action to be brought.

—◆—
SHAW v. ROBERTS.

COMYN applied, on behalf of the Sheriff, for a rule *nisi* under the Interpleader Act (a), and that the Court would allow cause to be shewn at Chambers.

Where the Sheriff applies to the Court for a rule under the interpleader act, cause cannot be shewn at Chambers.

BAYLEY, B.—The first section of the act gives authority to a Judge at Chambers, but the sixth section, as to Sheriffs, does not. You may take a rule *nisi*, but cause cannot be shewn at Chambers.

Rule *nisi* accordingly.

(a) 1 & 2 Will. 4, c. 58, s. 6; the case of *Cook v. Allen*, ante, p. 2 Dowl. Stat. 571. This Court 11, though it was the last day of refused a similar application in *Hilary Term*.

1833.

ALSTON v. UNDERHILL.

Where the plaintiff took an assignment of the bail-bond on the 11th, and issued a writ against the bail on the same day, the bail-bond not being forfeited till the 11th, but the writ against the bail was not served till the 11th—the Court set aside the proceedings on the bail-bond as having been commenced too early; for the summons is now the commencement of the action, and that is reckoned from the time the writ is sued out, and not when it is served.

The rules of Court issued before the uni-

THESSIGER had obtained a rule *nisi* for setting aside proceedings on the bail-bond, with costs, and also the costs of the application, on the ground of irregularity, the action on the bail-bond having been commenced too soon. The defendant was arrested on the 1st of *April*, for 670*l.*; an assignment on the bail-bond was taken on the 10th; the writ against the bail was issued on the same day, and it was served on the bail on *April* the 11th; *Easter-day* was on the 7th; the *Thursday* before was on the 4th; and the *Wednesday* after, on the 10th. The affidavit of the attorney's clerk stated, that the bail attended to justify on the morning of the 11th, at the Chambers of Mr. Baron *Vaughan*; that he had been instructed to justify bail in due time; but that, by a misapprehension that the rule of *Easter Term*, 2 *Will.* 4, that the days between *Thursday* next before, and the *Wednesday* next after *Easter-day*, should not be reckoned or included in any rules or notices or other proceedings, except notices of trial, and notices of inquiry, was in force, he thought he should have had the same time after the 10th *April* as he had on the 4th.

that act, the last day for putting in bail was the 10th, and the writ was not served on the bail till the 11th.

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BAYLEY, B.—The question is, when was it sued out.

Erle.—The old cases shew that the writ is not the commencement of the action against the will of the plaintiff. It is laid down in the notes to *Mellor v. Walker* (a), that the bill of *Middlesex* or *latitat* may be considered by the plaintiff, either as the commencement of the action, or as process to bring the defendant into Court, as it best serves his interest.

BAYLEY, B.—According to the old law, if you sued out your writ too soon it was irregular.

Erle.—In the case of *Best v. Wilding* (b) the writ was sued out too soon, but the arrest was not till after the cause of action had arisen; and it was held that the plaintiff might prove a cause of action which had accrued after the writ was sued out.

BAYLEY, B.—The summons is now considered to be the commencement of the action.

Erle.—The summons only operates against the defendant till it is served; and if the service is the time to be looked to, though the summons was here issued on the 10th, yet, as it was not, in fact, served till the 11th, when the bail-bond was forfeited, the proceeding was regular. He also cited *Dent v. Weston* (c). At all events, the

days; and if the last of such eight days should happen to fall on any day between the Thursday before, and the Wednesday after Easter-day, then, in every such case, the Wednesday after Easter-day shall

be considered as the last of such eight days.

- (a) 2 Wms. Saund. 1 c. note.
- (b) 7 T. R. 4.
- (c) 8 T. R. 4.

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Court will not give costs, as there was a mistake on both sides.

Thessiger cited the rule of *H. T. 2 W. 4*, c. 24, that no bail-bond taken in *London* or *Middlesex* shall be put in suit until after the expiration of four days, nor, if taken elsewhere, till after the expiration of eight days exclusive from the appearance day of the process.

BAYLEY, B.—That rule was promulgated before the late act, and therefore does not apply to this case, which arises on an act passed since. Nobody could suppose that the rule of *E. T. 2 W. 4*, applied here; but the plaintiff is clearly irregular; for, he was not entitled to sue out his writ till he had a cause of action; and, upon being served with this rule, he ought to have abandoned his proceedings. The rule must be absolute with costs.

The rest of the Court concurred.

Rule absolute, with costs.

given two days before the expiration of the original notice, which was for *Monday, June 3rd*, and ought to have been given on *Friday*, instead of *Saturday*. The cause ought also to have been entered on *Friday*, but it was not.

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WARDLE
v.
ACKLAND.

Dunbar shewed cause.—He contended that there was a sufficient notice, one day being reckoned inclusive and the other exclusive. He cited *Stafford v. Thompson* (a), where the commission day was on *Monday*, and notice of countermand on *Saturday*; and the Court held the countermand to be regular. *Sunday* is to be reckoned one of the days, if it happens first or in the middle. Rule eight (b), only says, that, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a *Sunday, Christmas-day, Good Friday*, or day appointed for a public fast, in which case the time shall be reckoned exclusively of that day also. Here the sitting day will be a good day for notice. The cause was not tried till *Wednesday*, the 5th, and there has been a waiver of the objection by the defendant. Some doubts being entertained as to the sufficiency of the pleadings, a summons to amend was taken out, and served on the *Saturday*, at the same time with the service of the notice of continuance; on the *Monday* the defendant's attorney was seen on the subject of the amendment, and he was then told that the summons to amend was abandoned, and he had notice not to act upon it; no objection was made at that time, and the defendant's attorney, being then in possession of the notice of continuance, ought to have returned it, or objected to it. He cited *Margerem v. Makilwaine* (c).

(a) 2 Barnes, 237.

(b) R. G. H. T. 1 W. 4.

(c) 2 N. R. 509.

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 WARDLE
 v.
 ACKLAND.

BAYLEY, B.—That case is not *ad idem*. The defendant was not bound to come and tell you you were wrong, and there has been no waiver on his part. A good continuing notice could not be given on *Saturday* for *Monday*, for *Sunday* was not a day for that purpose.

Rule absolute.

FEATHERSTONEHAUGH and Another, Assignees,
 v. REECE.

A client took out a summons to tax an attorney's bill, but the attorney having become bankrupt, the Judge refused to make an order for that purpose: the assignees then commenced an action, and the defendant having obtained an order to tax on the usual terms of paying the debt and costs—

HUTCHINSON shewed cause against a rule which had been obtained by *R. V. Richards*, calling on the plaintiffs to shew cause why the Master should not review his taxation of costs in this action, and why the declaration and subsequent proceedings should not be set aside for irregularity.

The plaintiffs sued as assignees of *Parker & Smith*, attornies, who had become bankrupt. After the bankruptcy and before the action, an application to have the bill taxed was refused by Mr. Justice *Patteson*; it was contended before him, that the property was vested in the assignees, and that they were not amenable to the Court.

stayed. The defendant's attorney, not having got the money up from his client at *Worcester*, took out a summons for further time to pay it in, but the learned Judge refused to allow further time: however, on the 2nd of *April*, a peremptory summons was taken out, to extend the time to the 3rd of *April*: the plaintiff's attorney refused to attend, as he said the defendant had no right to a peremptory summons; and the Judge made an order, altering the time to the 3rd. A copy of this order was served, and the money paid in on that day. On the same day, a declaration was filed, the notice of declaration being dated the 3rd. *Hutchinson* contended, that the order to tax having been made "on payment of debt and costs," the defendant could not now come and say he ought not to pay them. There is no authority on the other side, and costs are always allowed after action brought. He cited *Benton v. Bullard* (a), where the Prothonotary reported that it was the uniform course not to allow the costs of taxation to the defendant, though a sixth was taken off, where an action had been previously commenced; and the Court said, that the practice was the law in such cases. Where assignees are suing for the benefit of others, they are trustees; if the defendant had had the bill taxed before the bankruptcy, he would then have got his costs. As to setting aside the declaration, it appears to be perfectly regular, for, they got a week to pay the money, and, not having paid it in in time, the plaintiffs were entitled to proceed.

Richards, in support of the rule, contended that there was a difference between this and other cases, inasmuch as a summons to tax was taken out before the action was commenced; and, though the learned Judge refused it, he gave no reason for so doing. The assignees might now give a good reason, if there was any, for its not being taxed.

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 FEATHER-
 STONEHAUGH
 v.
 REECE.

(a) 4 Bing. 561.

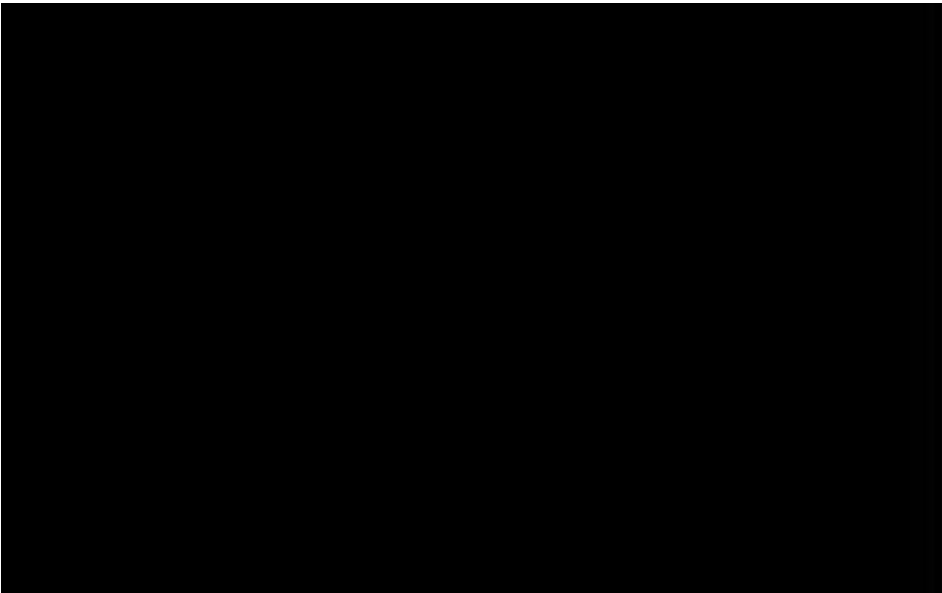
1833.

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The Master therefore ought not to have allowed the costs of taxation. The declaration was clearly irregular: the action ought not to have been commenced: but the money was paid in before the declaration was filed; the notice of declaration was dated the 3rd, the time for payment did not expire till the 3rd; and, therefore, to have got it down to *Worcester* on the 3rd, they must have sent it on the 2nd, which was clearly too early.

The Master, on being referred to on this point, said, it was the practice to send down into the country beforehand, taking care that the business is done in town before the notice is served in the country.

Per Curiam.—The act of 2 Geo. 2, c. 23, gives authority to tax. The act directs the bill to be delivered a month before action brought, and enables the client to have the bill taxed, though no action is pending; and the Court is authorized to award costs of taxation, to be paid in the manner there pointed out. The cases cited where costs have been given, are, where the party, having had full opportunity to tax, has suffered the month to pass. There is good ground for making a distinction in this case,



1833.

WHALLEY v. BARNETT.

R. V. RICHARDS had obtained a rule for an attachment, for not paying certain money in pursuance of a rule of this Court. The plaintiff had issued execution, upon which the defendant paid the debt and costs. Proceedings were afterwards set aside for irregularity, and it was part of the order, that the money levied and paid should be repaid with costs. The plaintiff tendered 44*l.* 19*s.*, the defendant demanded 46*l.* 10*s.*

Where an irregular execution is set aside, and the sums levied and paid by the defendant are ordered to be repaid, the plaintiff is only bound to repay the money which has been properly paid by the defendant.

Miller shewed cause.—The question is, whether, when there is a mistake in the process, and the amount levied is ordered to be refunded, the plaintiff is bound to pay more than the officer ought to have levied. We have tendered what were the proper charges: if they have paid more, it is paid in their own wrong.

Richards.—The intention of the Court was, that the defendant should be placed in the same situation. The execution was irregular, and, by the terms of the rule, whatever has been paid, ought to be repaid. I was entitled to set aside the execution *ex debito justitiæ*. If the terms of bringing no action had not been imposed, I should have recovered in an action all that has been lost by the wrongful execution: and I am now entitled to be put as near as possible in the same situation. The Court has no right to impose the terms of bringing no action, except upon our being put in the same situation. The 46*l.* 10*s.* is composed of 12*l.* 13*s.* for costs, according to the Master's *allocatur*, and 33*l.* 17*s.* money paid by us.

Lord **LYNDBURST**, C. B.—The Master has looked at the sum charged, and he thinks that the proper sum to have been demanded was 45*l.* 9*s.*; upon that sum being

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WHALLEY
v.
BARNETT.

paid in a week, the rule for the attachment will be discharged. Each party will pay his own costs: for one asked too much and the other tendered too little.

BAYLEY, B.—You cannot recover by attachment, unless there has been a demand of the proper sum.

Rule accordingly.

ISAAC v. GOODMAN.

Where notice of trial was given for the second sitting in the term, issue having been joined in the term, and the plaintiff gave notice of countermand:—*Held*, that the defendant could not move for judgment as in case of a nonsuit, the same term.

THOMAS moved for judgment as in case of a nonsuit. Issue was joined this term and notice of trial given for the second sittings. The plaintiff had given notice of countermand.

GURNEY, B., thinking the motion premature, ordered it to be mentioned in full Court.

Thomas, accordingly, renewed his motion.

Cowling, *amicus curiæ*, mentioned a case, which he said

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AMES and Another v. RAGG and Others.

THE plaintiffs were rectifiers at *Bristol*; and in *May* last they received an order for two puncheons of spirits, to be sent to the order of the bearer: the goods were sent, and a bill of exchange for 100*l.* was given, appearing to be drawn on *R. Williams*, and accepted by him, and there were the names of several indorsers upon it. The bill was dishonoured, and none of the parties to the bill could be found, except the defendant *Ragg*, who had had the goods, and who represented himself to have three other persons partners. An action was commenced against the four, and *Ragg* was arrested in *December*, on the joint process, and lodged in *Lancaster* gaol; but the other three partners could not be found, and it was believed that there were no such persons in existence, though the defendant asserted that there were. The writ was returnable in *Hilary* Term, and an *alias* had been issued returnable in this term. Under these circumstances, and to prevent *Ragg* getting out of custody—

Where goods had been obtained by fraud, and the plaintiff commenced an action against the person who obtained the goods, and other persons represented as his partners, but who could not be found, the Court gave leave to discontinue the first action without paying costs, and to detain the defendant in custody until the plaintiff had issued a new writ against him alone, and declared against him.

W. H. Watson applied for leave to discontinue without payment of costs, or that the defendant *Ragg* might be detained till the other three appeared, the defendant having obtained the goods by fraud.

BAYLEY, B.—Our course would be to proceed to outlawry against the others; but you may take a rule to discontinue, without paying costs, and that the plaintiff may be at liberty to commence a fresh action against *Ragg* alone, and declare before the end of the term.

Rule granted.

1833.

RUTTY v. ARBUR.

Where judgment was irregularly signed, no demand of plea having been made, though the defendant had entered an appearance, but the plaintiff, being ignorant of it, had entered an appearance for him, and gave notice of a declaration being filed, which the defendant did not object to, and the plaintiff gave notice to tax, and issued execution, and then the defendant took out a summons to set aside the judgment:—the Court, without entering into the question whether a Judge at Chambers has

FOLLETT shewed cause against a rule obtained by *Archbold* for putting aside the judgment in this action, and, in the mean time, to stay proceedings. The writ of summons was served on the defendant on the 9th of January last. The defendant entered an appearance on the 10th, but the plaintiff's attorney having searched the appearance-book without finding it, entered an appearance for the defendant on the 21st, and filed a declaration, notice of which was left at the defendant's residence on the 26th. On the 28th, the defendant, in a conversation at a meeting of his creditors, admitted having received the notice of declaration, but said nothing about having entered an appearance, or that he had any defence. The defendant did nothing till the summons to compute came on to be heard before *Gurney, B.*, on the 12th of February; and the defendant then opposed the granting of the order. His Lordship heard all the circumstances, and granted the order; and it was not until February 20th, that the defendant took out a summons to set aside the proceedings: execution having been issued the day pre-

a Judge at Chambers can only do—namely, stay proceedings, in order to apply to this Court, and this motion was made within the first four days.

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RUTTY
v.
ARBUR.

BAYLEY, B.—This was a motion to set aside the judgment for irregularity, the judgment having been signed before any demand of plea. An appearance having been entered, there ought certainly to have been such demand, unless something has occurred to supersede the necessity of it. It appears, that, on the 26th of *January*, notice of filing a declaration was given: that was irregular, if the plaintiff knew of the appearance being entered, because it ought to have been delivered to the attorney who entered the appearance. The defendant's attorney must have known that the plaintiff's attorney was acting under a misconception; and therefore he might have told him that he had overlooked the appearance, and that the notice of declaration was irregular: but he does not do so, and takes no step to apprise the plaintiff of the irregularity; and, though he met the plaintiff's attorney on the 28th, does not give him any reason to suppose there was any thing irregular. The defendant having thus suffered him to proceed, the plaintiff's attorney was justified in supposing that he was right. On *February* 4th, judgment was signed; on the 11th a summons was taken out to compute, but the defendant was then too late; he should have objected to the notice of declaration being filed, or have given notice that the proceedings were irregular.

VAUGHAN, B.—The rule is, you must come in the first instance. Notice of declaration being filed was given on the 26th of *January*, and the defendant, on the 28th, admits having received it, yet he takes no step till the 20th of *February*. In the mean time, a rule to compute was taken out on the 9th, and heard on the 12th. It is unnecessary to decide whether a Judge at Chambers can set aside a judgment; the defendant is precluded by his own laches.

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RUTTY
v
ARBUR.

GURNEY, B.—The matter was fully discussed before me, and I thought you were too late.

Rule discharged, with costs.

BROADHURST v. DARLINGTON.

Where an action was brought by an attorney on a bill not taxable, and a verdict was taken, subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum:—
Held, that it was competent for the Court to examine whether the arbitrator had adopted the right rule.
The proper charges in respect of an abstract of title

THIS was an action by an attorney for the amount of a bill of costs for managing an estate, and preparing an abstract. At the assizes, at *Chester*, the plaintiff obtained a verdict for 400*l.*, the damages in the declaration, subject to a reference to Mr. *Lloyd*, the clerk of assize, who was to have the assistance of the Prothonotary, if necessary. Upon taxation, 15*l.* 5*s.* 10*d.* was taken off, leaving 186*l.* 7*s.* 4*d.* due to the plaintiff.

Wightman obtained a rule to refer the bill back for reconsideration, upon the ground that too much was allowed for drawing and copying the abstract.

John Evans shewed cause, and contended, that, upon such a reference, even if the arbitrator had adopted a

he said 1*s.* *per folio* was allowed for drawing, and 8*d.* for a copy.

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BROADHURST
v.
DARLINGTON.

LORD LYNTHURST, C. B.—There is no such rule as that. The master certifies that the proper charge is 6*s.* 8*d.* for drawing, and 3*s.* 4*d.* for copying, *per* sheet of 40 lines. The sheet may or may not contain 10 folios. If that is the rate at which the charges have been allowed, they are correct.

It was ascertained, upon calculation, that the arbitrator had allowed according to that rate; and the rule was, therefore,

Discharged.

ROBERTSON v. BARKER.

THIS was an action tried at *York*, at the last assizes. A rule *nisi* for a new trial on the part of the plaintiff had been moved for on a previous day in this term, and granted.

After a motion for a new trial has been granted on certain points, it is irregular to make another motion upon another point respecting the same cause, to come on at the same time.

Heaton now moved, on the part of the plaintiff, within the first four days, to rescind an order made by *Gaselee, J.*, in the cause, and that this motion might come on at the same time with the other. The plaintiff, finding he had not put enough into his particulars, obtained an order of *Gaselee, J.*, just before the *Lent* assizes, to amend them; and the order was made, on the terms of allowing the defendant, who had paid some money into Court, to pay in a further sum. The particulars were amended, and a further sum was paid into Court by the defendant generally. The object of the application now was, that the money paid in might be restricted to the common counts only.

BAYLEY, B.—A motion has been already made in this case for a new trial. I never remember an instance of two

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ROBERTSON
v.
BARKER.

gentlemen making two motions in the same cause to come on at the same time. You accepted an order on certain conditions, and now you want to vary the conditions. You come too late.

The other Barons concurred.

Rule refused.

LAWSON v. CASE.

An affidavit made by a defendant in a cause cannot be read, unless his addition is inserted.

MANSEL had obtained a rule *nisi* for setting aside a declaration for irregularity. The writ of summons and notice of declaration were to answer the plaintiff in an action of "trespass in the case;" the declaration was trespass on the case *upon promises*.

Thessiger shewed cause. He contended that the affidavit on which the rule was obtained was defective, in not giving the deponent's addition conformably to the late rule (a); and by an affidavit of the plaintiff's attornies it appeared that the rule was not served till after 9 o'clock at night, which was contrary to another rule (b). He also contended that the variance of the process from the decla-

of the attornies was not sufficiently precise to found such an objection upon.

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LAWSON
v.
CASE.

Mansel.—As to the defect in the affidavit in not stating the deponent's addition, it was unnecessary, as the deponent is the defendant in the cause. He referred to a case in this Court where the question had arisen on an objection to an affidavit in support of a plea in abatement, when the Court intimated that the addition was unnecessary, the affidavit being made by the defendant (a).

VAUGHAN, B.—In *Tidd's Practice* (b), it is said, there is no necessity to give the defendant's addition in an affidavit.

LYNDHURST, C. B.—Before the late rule, there was a similar rule existing in the *King's Bench* (c).

(a) See *Poole v. Pembrey*, 1 Dowl. Prac. Rep. 693.

(b) Page 179.

(c) See Rule, M. T. 15 Car. 2, K. B. In an anonymous case, 6 Taunt. 73, it was held, that an affidavit made by a defendant in a cause in which he referred to his quality of defendant, was good, though it did not give his addition; but, the reason the Court there gave was, that there was no rule in that Court which requires the additions of deponents to be given. In the *King's Bench*, such a rule has existed for a period of 170 years, and nearly in the same terms. The rule of Mich. 15 Car. 2, (1663) is thus: "The true place of abode, and the true addition of every person who shall make affidavit in Court here, shall be in-

serted in such affidavit." In *Jarrett v. Dillon*, 1 East, 18; *Dargent v. Vivant*, Ib. 330; *Pollen v. De Sousa*, 4 Taunt. 154; *Collins v. Goodyer*, 2 B. & C. 563, and other cases, it was held, that that rule applied to *plaintiffs* making affidavit; and there seems, therefore, to be no good reason why it should not be applied to *defendants* also. The terms of the new rule of all the Courts are, it will be seen, a little different from the old rule of the *King's Bench*; it is merely, that "the addition of every person making an affidavit shall be inserted therein." The old rule specified the "addition" and "place of abode," as if they were distinct things: and, in *Collins v. Goodyer*, 2 B. & C. 563, a distinction appears to have been

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LAWSON
v.
CASE:

The Court held that the words of the rule were so general, "that the addition of *every* person making an affidavit shall be inserted therein," that it applied as much to an affidavit made by a defendant as by any other person; and discharged the rule.

Rule discharged, with costs.

drawn between them; but the term "addition," generally, would seem to include every thing that can be usefully added to a defen-

dant's name, and to include, therefore, his description, as well as his place of abode.

JONES v. PRICE.

A *distringas* for proceeding to outlawry may be grantable under circumstances which would not entitle the plaintiff to a *distringas* to compel an appearance.

Semble, that a defendant may now be outlawed in the *Exchequer*.

PLATT moved, that, leaving a copy of the process at the defendant's last place of abode, and sticking up a copy in the office, should be deemed good service. It was sworn that the defendant's only residence was at the *Fleet* prison, and that he had sold off all his goods. The deponent stated, that he had been to the prison several times, with the intention of serving the defendant, but could not succeed in seeing him; but, that several of his sons were about, and that, if a copy were put up in the office, the defendant would, no doubt, be soon made acquainted with it. It was

ficient is not shewn to entitle you to have a *distringas* for appearance. You may have a *distringas* for the purpose of going to outlawry, on the return of *nulla bona* and *non est inventus*.

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JONES
v.
PRICE.

A *distringas* granted for outlawry, but not for appearance.

could not be outlawed therein. 1 5, expressly gives this Court jurisdiction by summons and outlawry.
Price, 309; Tidd, 38, 132; but the late act of 2 Will. 4, c. 39, s.

HAINES v. NAIRN.

THE defendant having been arrested in this action for 2,000*l.* and upwards, paid into Court in lieu of bail the sum of 2,000*l.* with 20*l.* for costs, under the 7 & 8 Geo. 4, c. 71. There was a verdict, by consent, for the plaintiff, for 2,705*l.* A judge's order was then obtained by consent, for having the sum of 2,020*l.*, the money paid into Court, paid out to the plaintiff; but the officer claimed poundage, which the plaintiff declined to allow. The claim was said to be made under a rule of *James 1 (a)*. The plaintiff took out the money *minus* the poundage; and thereupon—

When a motion is to be made to take out money paid into Court by a defendant in lieu of bail, notice of the motion should be given to the solicitor of the Treasury.

Semble, that poundage cannot be claimed on money so paid in, where it is not sufficient to satisfy the amount of the plaintiff's verdict.

Hill applied to the Court to be allowed to take out the

(a). The rule alluded to was probably a rule of *Hil. 5 Jac. 1*, "That every party, at whose request any sums of money shall be brought into Court here to be kept, shall pay to the Secondary of the Chief Clerk of our Lord the King here for the time being, for the keeping of such sum of money, twenty shillings for every 100*l.*; and so according to that

rate shall be paid for every greater or lesser sum, for the keeping thereof, as well for a sum of money to be brought in in form aforesaid, as for a sum of money now remaining in Court; and for a sum of money under 10*l.*, the sum of two shillings shall be paid for such money, as used to be paid formerly."

1833.
 HAINES
 v.
 NAIRN.

remainder of the money: he had no affidavit. But, upon a suggestion from the Court that it was necessary that there should be an affidavit to put them in possession of the circumstances, or else that the Judge's order should be made a rule of Court—he postponed his motion. On a subsequent day, he renewed his motion: he stated that the officers had now abandoned their claim to the poundage.

The Court thereupon granted his motion: and, as no notice had been given to the Treasury, the Court ordered the rule to be served on the solicitor of the Treasury.

Rule *nisi* accordingly.

JOHNSON v. MACDONALD.

Where several actions are brought on the same bail-bond, it is too late, after verdict, to move to stay proceedings on payment of the costs of one ac-

CHANNELL moved to stay proceedings in three actions on the same bail-bond, on payment of costs in one only, according to the rule of H. T. 2 W. 4 (a). He admitted that verdicts had been obtained in all the actions.

Per Curiam.—You are too late in your application.

1833.

PHILLIPS v. DRAKE.

CHAMBERS had obtained a rule *nisi* for an attachment against a witness for not obeying a *subpœna*.

Hutchinson was about to shew cause, when—

Chambers took a preliminary objection to the affidavit on which cause was shewn. It was intitled in the *Exchequer*, but was not sworn before a Baron of the *Exchequer*; it appeared to be sworn before *Gaselee*, J., a Judge of the *Common Pleas*. He contended, that a Judge had no power under the 11 *Geo. 4* & 1 *Will. 4*, c. 70 (a), to take an affidavit in a matter which arose entirely in a Court of which he was not a Judge. Here the action out of which this motion grew was in the *Exchequer*; and the contempt incurred by not obeying a *subpœna* of this Court was a contempt to this Court only, and not to any other Court; and that, therefore, a Judge of the *Common Pleas* had no common jurisdiction with the Judges of this Court, within the meaning of that act, in a matter which was entirely personal to this Court.

Since the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 4, it is no objection to an affidavit to ground an attachment against a witness for contempt, that it is sworn before a Judge of a different Court from that to which the contempt was shewn.

The Court, however, were of opinion that the affidavit was properly sworn, and that the "common jurisdiction" mentioned in the act was to be understood with reference

(a) Which enacts, "That every Judge of the said Courts, to whatever Court he may belong, shall be and he is hereby authorized to sit in *London* and *Middlesex*, for the trial of issues arising in any of the said Courts, and to transact such business at chambers, or elsewhere,

depending in any of the said Courts, as relates to matters over which the said Courts have a common jurisdiction, and may, according to the course and practice of the Court, be transacted by a single Judge." See 1 *Dowl. Stat.* 371.

1833.
 PHILLIPS
 v.
 DRAKE.

to the subject-matter of the application, and not to the Court itself.

Upon the merits, there was a satisfactory answer; and the rule was discharged.

Rule discharged.

SPRY, Administrator, v. WEBSTER.

Where a cause was referred to arbitration, the costs being to abide the event, and the action was brought by an administrator, with counts in the declaration on promises to himself as administrator, and the arbitrator awarded that the plaintiff had no cause of action:—*Held*, that the plaintiff was liable to an attachment for

THIS was an action by an administrator. The declaration was in *assumpsit*, and contained a count for money had and received to the use of the plaintiff, as administrator. The action was referred, and the costs were to abide “the event.” The arbitrator awarded, that the plaintiff had no cause of action, and was not entitled to recover, and he ordered the suit to be discontinued.

Hoggins had obtained a rule *nisi* for an attachment against the plaintiff, for not paying the costs; contending that “the event” must mean the “legal event;” and that, as there were counts on promises to the plaintiff as administrator, he would have been liable to costs, if he had

which must mean the legal event. The plaintiff is therefore liable to the costs.

1833.

SPIVY
v.
WEBSTER.

Rule absolute, unless costs paid in a fortnight.

Cox, Assignee, v. TULLOCK.

R. V. RICHARDS having obtained a rule *nisi* for setting aside the service of the writ of summons in this action with costs—

Where there is an irregularity in any proceeding had in vacation, and there is time in the course of that vacation to apply to a Judge at chambers, it is imperative upon the party complaining to do so; and he cannot wait to move to set aside the proceeding till the first four days of next term, though there has been no intermediate step taken.

There can be no waiver unless with a knowledge of the irregularity.

Ball shewed cause.—The irregularity complained of is in the service of the writ, which was issued into the county of *Surrey*, where the defendant resides, and was served on him whilst at the chambers of Mr. Justice *Gaselee*, which exceeds two hundred yards from the boundary of the county of *Surrey*. I oppose the rule on two grounds—*First*, that this application comes too late; and *secondly*—that the irregularity has been waived. This rule was moved for on the 30th of *April*; the writ of summons having been served on the 18th of *March*. There was, therefore, plenty of time to have applied to a Judge in vacation to set aside the process. The 33rd rule of *Hilary Term*, 2 Will. 4, expressly provides, that no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time (*a*), nor if the party applying has taken a fresh step after knowledge of the irregularity. Then, as to the waiver: this is an action by the plaintiff as assignee of the bail-bond; there were two actions, and, on *March* 18th, a summons was taken out by the present

(*a*) In the *King's Bench* it was held by *Patteson, J.*, that where the writ was returnable *November* 2nd, it was too late on the 10th to take

advantage of a misnomer in the process. *Espinasse* for the rule, *Dompier* shewed cause.

1833.
COX
v.
TULLOCK.

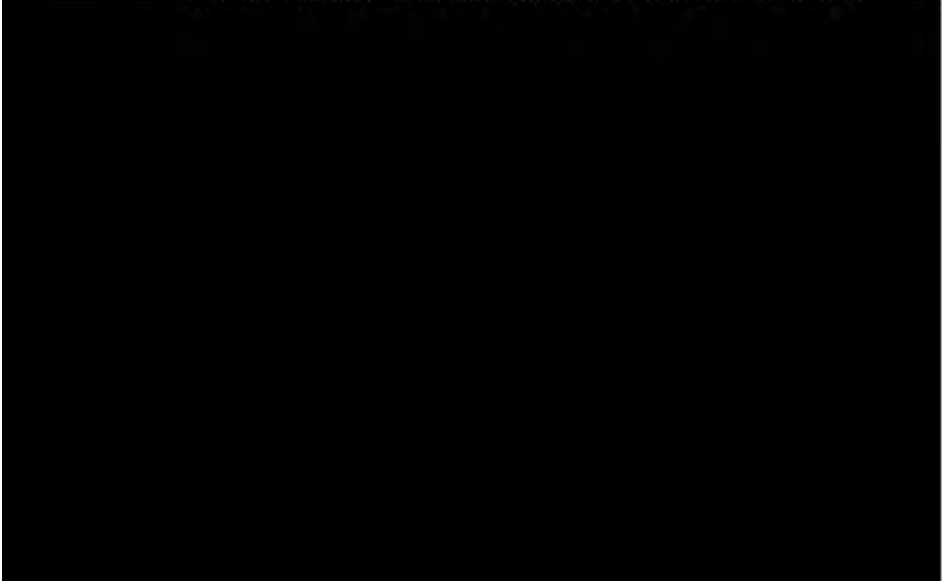
defendant's attorney, calling on the plaintiff to attend before a Judge, and shew cause why, on payment of the debt and costs in one action, proceedings in both actions should not be stayed. That summons was taken out in the other action, but it clearly recognizes this action, and thereby admits that it was properly commenced.

R. V. Richards.—If the proceedings are irregular, and no further proceedings have been taken, we are in time. Parties are not bound to go before a Judge. The meaning of the rule is, that you must come within the first four days of the term; as nothing was done, we were not obliged to apply to a Judge at chambers to set aside the summons.

BAYLEY, B.—In the mean time the declaration may have been delivered.

R. V. Richards.—Nothing of that kind has been done; and the waiver entirely fails.

BAYLEY, B.—I think they cannot rely on a waiver; however, it does not appear that the service of the summons to stay proceedings was subsequently to the service of the



1833.

ALIVEN and Others v. FURNIVAL.

THIS was a rule obtained by *Manning*, calling on the defendant to shew cause, why the common counts should not be restored, pursuant to an order of *Bolland, B.*, and why the Master should not review his taxation. The action was on a *French* judgment, to which the defendant pleaded the general issue, and several special pleas; the Court upon a former occasion had ordered the general issue to be struck out (a), and the order was drawn up for striking out the common counts also, as the general issue applied only to them. Another application was made to substitute the general issue for the special pleas, and then another order was obtained to restore the common counts.

No objections to the Master's taxation can be entertained unless they are specified in the affidavit or rule.

Where a rule prays for several things, to some of which the party is entitled and to others not, but cause is shewn against all, no costs are given on either side; though, if cause had been shewn against the bad part only, the party shewing cause would have had costs.

Carrington shewed cause.—The objection is to the amount of the Master's taxation, which was 12*l.* 17*s.* 4*d.*, which they say is not enough; but if any objections were intended to be made to the items of taxation, they should have been specified. Our objection to the common counts being restored is, that it will create additional expense, and the defendant has given security for costs to the amount of 150*l.*

Manning.—By the terms of this order we were to have our costs; but as the former rule directed expunging counts as well as pleas, the Master would not allow us our costs.

Carrington objected that that was not in the affidavit.

Manning said, it was before the Master.

(a) See *ante*, Vol. 1, p. 690.

1833.
 ALIVEN
 v.
 FURNIVAL.

BAYLEY, B.—You cannot do that; if in your affidavit you had specified the objections, they would have known how to answer them.

Carrington contended he was entitled to the costs of the rule.

BAYLEY, B.—The rule is good in part, and bad in part; if you had said nothing as to the good part of the rule, you would have had your costs; but you objected to the expense.

Rule absolute, as to restoring the counts, and discharged as to the other part without costs.

THOMPSON'S Bail.

If bail justify by affidavit, which states they are "possessed," instead of "worth," &c., the plaintiff is not liable to pay the costs of an unsuccessful opposition.

THESE bail were opposed; but, upon examination, their property was found to be amply sufficient, and they justified.

Steer then applied for the costs occasioned by the unsuccessful opposition, the bail having justified by affidavit according to the rule of T. T. 1 W. 4 (a).

1833.

LUNTLY v. NATHANIEL.

THE defendant in this case was a practising barrister, and, having been arrested for debt, *Mansel* obtained a rule *nisi* to discharge him out of custody, on an affidavit, which stated, that, at the time of the arrest of the defendant, he was returning from the Sessions, at *Newington*, where he had been engaged as counsel in several prosecutions and defences, and was proceeding home to his house at *Lambeth*. He referred to *Meekins v. Smith* (a).—Cause was directed to be shewn at the rising of the Court on the next day.

A practising barrister is privileged from arrest whilst he is on his return from Court.

Comyn shewed cause.—It was not denied by his affidavit, that the defendant was, in fact, taken whilst returning from the Sessions; but it was sworn that the defendant, at the moment of the arrest, was in a picture shop, near the *Obelisk*; and he contended, that he could not be considered to be in the course of his return, after deviating, unnecessarily, into a shop.

Per Curiam.—We are of opinion that the defendant is entitled to be discharged. A practising barrister is privileged from arrest, *eundo, redeundo, morando*. It is unnecessary to consider the general question of a barrister's privileges, as we think the defendant here was clearly arrested *redeundo*; if he had remained an unreasonable time in the shop, it might have been different. The defendant must be discharged without payment of costs; and attorneys and officers will learn that a defendant, under such circumstances cannot be arrested.

Rule absolute.

(a) 1 H Bl. 636.

1833.

BALGAY v. GARDNER, Bart.

To induce the Court to allow an appearance to be entered for a defendant, the affidavit must shew what means have been taken to execute the *distringas*.

J. JERVIS moved for leave to enter an appearance for the defendant. His affidavit stated, that, the defendant not being able to be served personally with the writ of summons, a *distringas* had been moved for, and obtained, against the goods of the defendant; and upon the officer proceeding to the residence of the defendant to execute it, he received notice that all the goods of the defendant there had been assigned by him, and that the sheriff had returned *nulla bona*.

BAYLEY, B.—The words of the act (*a*), are “and if it shall appear to the satisfaction of the Court, that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for the Court to authorize the plaintiff to enter an appearance.” Here it is not stated what were the steps you took to obtain an appearance, and therefore we cannot say that due and proper means have been taken. We therefore cannot grant the rule.

Rule refused.

1833.

DYKE v. EDWARDS.

PETERSDORFF shewed cause against a rule which had been obtained by *Hutchinson*, for judgment as in case of a nonsuit. The defendant has already had the costs of the day for not proceeding to trial; and the defendant therefore cannot now move for judgment as in case of a nonsuit; for the 69th rule is express, that no judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default.

If, after a motion for the costs of the day, for not proceeding to trial, the plaintiff suffers another term to elapse without giving notice of trial, that is a new default which entitles the defendant to move in the next term for judgment as in case of a nonsuit.

Hutchinson.—We had costs for a default in not proceeding to trial in *Michaelmas* Term; *Hilary* Term has since passed, and no notice of trial has been given; that is another default.

BAYLEY, B.—We think, that not giving notice of trial in *Hilary* Term was a new default, and entitled the defendant to move.

The defendant agreed to accept a peremptory undertaking, and the rule was discharged.

WORLDSON'S Bail.

COWLING applied for leave to amend an affidavit of sufficiency of bail, which had the word "possessed" instead of "worth."

Affidavits of justification, which merely state that the bail is "possessed" instead of "worth," will not in future be allowed to be amended.

GURNEY, B.—You may amend, but this is the last time I can allow such an amendment.

1833.

JONES v. PEARCE.

The affidavit whereon to change the venue, must not only state that the cause of action arose in the county to which the removal is prayed, but also that it did not arise elsewhere.

CQWLING moved, in an action for work and labour, to change the venue to *Yorkshire*. The affidavit stated that the cause of action arose in *Yorkshire*: but it did not proceed to say, in the usual way, "and not elsewhere."

BALYEV, B.—The affidavit is not sufficient.

Rule refused.

MOULD v. MURPHY.

Where the declaration and rule to plead were both in vacation, a judgment signed in the next term without a new rule to plead—*Held*, regular.

INTERLOCUTORY judgment having been signed in this action for want of a plea—*R. V. Richards* obtained a rule *nisi* to set it aside for irregularity, contending that a rule to plead of the term of which judgment was signed was necessary, and no such rule had been given.

Archbold shewed cause.—It was formerly the practice that no rule to plead could be entered in vacation; it must have been in term; but now, by the new act (*a*), a party is enabled to proceed in vacation, and therefore the rule to

1833.

DOE *d.* JENKS and Others, Executors, *v.* ROE.

THERE were three demises in the declaration, one by two persons, described as executors, another by persons described as assignees, and a third generally. The officer refused to draw up the rule for judgment against the casual ejector, because, in the title of the affidavit, the plaintiff was described as "*Doe on the demise of Jenks and others*," without stating them to be executors, as they were described in the declaration.

Where, in a declaration in ejectment, the lessors of the plaintiff are described to be executors, the affidavit of service need not, in stating the name of the cause, notice the character of the lessors stated in the declaration.

Hayes now moved for judgment, and contended that it was unnecessary to have stated any character of the parties in the declaration.

GURNEY, B., having some doubts whether the affidavit should not have agreed with the declaration, it was mentioned again to the full Court, who thought the affidavit sufficient, and granted the rule.

CLARKE *v.* LORD.

THE defendant, *Lord*, was sued by the plaintiff in this action for a debt of 368*l.*, and the plaintiff obtained judgment against him in *November* last, in this Court; another creditor, of the name of *Sturgess*, had before got judgment in the *King's Bench* against the defendant, for a debt of 227*l.*; between the time of the two judgments being obtained, a *fiat* was issued against the defendant. Execution having been issued by the plaintiff in this action, the

When the sheriff applies to the Court for protection under the interpleader act, no one has a right to be heard against the rule, unless he is called upon by the rule, though he is in fact a claimant; and if he is called on

in one character he cannot appear in another.

Where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the Court will make the sheriff pay the costs of appearing.

Where the rule called upon assignees of a bankrupt, who had made a claim under the *fiat* of bankruptcy, but which was afterwards superseded, the Court refused to make the sheriff pay the costs of the assignees' appearance.

1833.

CLARKE
v.
LORD.

sheriff, on seizing certain property of the defendant's, was met by three claimants. *Sturgess*, the messenger under the commission—*Hodges*, the landlord, who also claimed as mortgagee—and the defendant himself, who claimed as executor of his late father. In executing the writ of *fi. fa.* in *Sturgess v. Lord*, the sheriff, having met with the same difficulties, applied to the Court of *King's Bench* under the interpleader act, and on that rule he paid the amount of *Sturgess's* execution into Court; and an issue was directed between *Lord*, as executor, and the assignees, to try in whom the property of these goods was. In the mean time the Court of Review set aside the bankruptcy. The sheriff now applied to this Court for protection in the present action, and obtained a rule *nisi* calling on the several parties to appear and state their claims, and why the residue of the money levied should not be paid into Court, subject to the order of the Court.

Adams, Serjt., and *Busby*, for *Lord*, as executor.

Sir *G. Lewin* for the assignees, and also for *Stephens*, a mortgagee.

Humfrey, for the plaintiff, *Clarke*.



the assignees also: and Mr. *Stephens* is not before the Court, not being called upon by the rule. The assignees have given an indemnity against the claim of *Stephens* for rent, but that does not give him any right to appear here against the sheriff; we will take care he is not prejudiced. *Hodges*, as mortgagee, in his character of landlord, had a right to distrain.

1833.
CLARKE
v.
LORD.

Cresswell, for the landlord, applied for his costs. Notice was given to the sheriff, last *August*, that rent was due in *May*. There was no occasion to contest the landlord's claim; he would be clearly entitled as against all the parties.

GURNEY, B.—Why did the sheriff not make the landlord a party in the *King's Bench*?

Platt.—We say that the notice from the landlord was not till *November 24th*, and the money was not made till long after.

BAYLEY, B.—The sheriff must either pay the landlord's costs, or remain liable to an action.

Sir *G. Lewin*, applied for his costs, being called on as assignees; but the Court refused them.

Adams, Serjt.—If the sheriff has made a wrongful seizure, he ought to pay our costs, and therefore the costs should be supended.

BAYLEY, B.—It is not likely the sheriff can be liable to pay any of the other costs.

VAUGHAN, B.—The sheriff is not entitled to costs, and therefore he is not liable, if he has acted fairly.

1833.

MOORE v. JONES.

The defendant is entitled to have a suggestion entered to deprive the plaintiff of costs; where he does not recover 5*l.*, though his demand was in reality more than that amount, but he failed to prove it, through the absence of witnesses.

THESSIGER having obtained a rule *nisi* for entering a suggestion under the *Blackheath* Court of Requests Act, to deprive the plaintiff of costs, he having recovered less than 5*l.*—

Platt shewed cause.—This is not a case within the act. From the affidavits, it appears that the action was brought for 16*l.* 7*s.*, on the following account:—5*l.* for money lent to the defendant's son; 7*l.* 13*s.* for his board and lodging; and 3*l.* 14*s.* for money paid. The defendant pleaded the general issue, and a set-off to the amount of 9*l.* 13*s.* The plaintiff was prevented by the absence of a witness from proving his whole demand; but he proved more than 5*l.*; and the defendant went into his set-off, and proved a payment of 5*l.* on account, and treated it as a set-off.

Lord LYNDHURST, C. B.—If a sum originally above 5*l.* is reduced by set-off, it is not within the act.

Thessiger cited *Jones v. Harris* (a). *Drew v. Coles* (b).

to this, that you are unable to prove your demand; but, if your witnesses are not in attendance, the cause should be put off. It is clear that the original debt, as proved at the trial, did not exceed 5*l.*; the defendant is therefore entitled to have a suggestion entered.

1833.

MOORE
v.
JONES.

Rule absolute (a).

(a) See *Fitzpatrick v. Pickering*, 2 Wils. 68; and 1 Dowl. P. C. 603, n. (a).

BRAMIDGE v. ADSHEAD.

WHITMORE, on behalf of the sheriff of *Staffordshire*, obtained a rule *nisi*, calling upon the plaintiff in the action, and *T. Bowen*, to appear and state their claims to the goods of the defendant, which had been seized by the sheriff under a *fi. fa.* issued by the plaintiff.

Where application is made by the sheriff for relief under the Interpleader Act, the Court will not try the merits of the respective claims upon affidavit.

Rigby, who appeared for the plaintiff, and *R. V. Richards*, who appeared for *Bowen*, claiming under a bill of sale, were proceeding to detail circumstances connected with the deed, the plaintiff contending that the deed was clearly fraudulent, as no possession was given under it—when they were stopped by the Court.

BAYLEY, B.—We cannot try the merits of the claim upon affidavit; all we can do is, to direct an issue in which *Bowen* will be the plaintiff, and *Bramidge* the defendant. The defendant ought to admit the taking of the goods, and also, that it was done under the judgment and *fi. fa.*

Rule absolute.

1833.

NICHOLL *v.* COLLINGWOOD.

Upon a rule for judgment as in case of a nonsuit, the plaintiff must shew some excuse, and the defendant is not obliged to accept a peremptory undertaking.

CRESSWELL had obtained a rule *nisi* for judgment as in case of a nonsuit for not proceeding to trial.

Mansel appeared to shew cause, but without any affidavit. He tendered a peremptory undertaking, and submitted that that was all that the Court required of him. He suggested his client's illness as the cause for not going on.

Per Curiam.—A slight cause is sufficient on the first default, but there must be some; here there is none; and, therefore, the rule must be absolute.

Rule absolute.

LEWIS *v.* MORRIS and ROBERTS.

When, on account of political excitement and other circumstances, a fair trial cannot

THIS was an action for maliciously arresting the plaintiff on two *ca. sa.*'s, and for slander. A rule *nisi* was obtained for changing the venue from *Carnarvon* to *Anglesey*; and it appeared that, from the situation of the par-

The Court, after consulting the Master, said, that the proper course was, that they should be costs in the cause. If the plaintiff succeeded, he would then get them; and if he failed, he would not pay them.

1833.
LEWIS
v.
MORRIS.

Rule absolute.

MASON v. POLHILL.

THIS was an action for pirating the opera of *Robert le Diable*, which had been brought out at the King's theatre. It was commenced in *Easter Term*, 1832. The defendant pleaded the general issue—Not guilty. The cause stood in the paper for *July* 10th, but, in consequence of some negotiation, nothing was done till lately, when notice was given for the sittings after this term. In the meantime, *Mason* had become a bankrupt in last *November*, and the assignees were now proceeding with the action in his name; but *Mason* did not approve of the proceeding.

Where a plaintiff becomes bankrupt in the middle of a cause, the assignees, if they proceed with the action, must give security for all the costs. The defendant may apply for this security at any time before a fresh step in the cause is taken.

Ryland, under these circumstances, obtained a rule *nisi*, calling on the assignees to give security for costs; against which—

Chilton shewed cause.—The application is too late. The *fiat* was granted on *November* 2nd.

BAYLEY, B.—It is not stated when the assignees were appointed; that lies particularly within your own knowledge.

Chilton.—It appears, that, before this term, we gave notice for the sittings in the term; the application ought therefore to have been made before the last *Saturday* in the term (*May* 4th). They ought to have come earlier in the term. At all events, the assignees cannot be liable to give security for costs till they came in.

1833.

MASON
v.
POLHILL.

Per Curiam.—You want to take the benefit of all the proceedings, and the rule is, that you must give security for all the costs. With respect to the lapse of time, on a motion to set aside proceedings for irregularity, you may be too late, even though no step has been taken: there you come to ask a favour; but here it is not a favour but matter of right that is asked. The rule must be absolute.

Rule absolute.

SMITH v. ROLT.

An action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that the attorney had been guilty of gross negligence, and then the attorney brought an action for his bill of costs, the Court refused to interfere to stay proceedings in

CURWOOD applied to stay the proceedings in this action until another action of *Rolt v. Smith*, in the Court of *King's Bench*, was disposed of. The plaintiff in this action was an attorney, and the action was brought for 47*l.*, for costs incurred in defending an action brought against *Rolt* by one *Hall*.

The circumstances which led to these actions appeared to be these: *Rolt* and *Hall* were joint owners of some property which they sold to one *Hunter* for 200*l.*; *Hunter* paid the money by two cheques for 100*l.* each; one for *Hall*, and the other for *Rolt*. The cheques were given

either to *Rolt* or *Smith*, and *Hall* brought an action

Hall. A rule *nisi* for a new trial was, however, obtained by *Smith* in the action brought against him by *Rolt*; and *Smith* then brought an action in this Court against *Rolt* for his bill of costs, in which issue was joined and notice of trial given. He contended, that *Smith* having been found to have been guilty of gross negligence in defending *Rolt*, an action would not lie by him for his bill; and that, therefore, this Court would either stay proceedings altogether, or else till the motion for a new trial in the action in the *King's Bench* was disposed of.

1833.

SMITH
v.
ROLT.

The Court granted a rule *nisi*, *Bayley*, B., observing, that it would be a motion to stay trial, and the proceedings being *inter eosdem*, the judgment in that action might be pleaded in bar; and if it could, that might be a reason for not granting such an application.

Follett shewed cause.—There is no ground for staying proceedings in this action. In the action of *Hall v. Rolt* the particulars were for 158*l.*; the arbitrator, to whom the action was referred, gave 129*l.* only; *Rolt* therefore derived some benefit from the defence; part of the demand was for rent, which *Rolt* ought to have paid into Court, as the arbitrator found it to be due; and therefore whether the 100*l.* was recovered in that action, there must have been a verdict for *Hall*, and no motion was ever made to set aside that verdict. In the action of *Rolt v. Smith* there is a rule *nisi* for a new trial, and the Chief Justice said it would be satisfactory to send that action to be tried again. Why then should *Smith* be delayed in suing for his bill of costs? *Rolt* will have the advantage of giving the verdict in evidence, and he is in possession of all the evidence to shew the negligence of *Smith*. *Smith* might as well apply to have that action postponed, to enable him to get a verdict in this action.

1833.

SMITH
v.
ROLT.

Lord LYNDHURST, C. B.—Negligence will be a defence in this action. The second verdict appears to be inconsistent with the first. How can it be said that one of two inconsistent verdicts is better than another? If the judgment in that action is an answer to the present one, the defendant can plead it. The rule must be discharged.

Rule discharged, with costs.

LUCAS v. JENNER.

If an executor pleads a plea of *plene administravit*, as well as the general issue, the plaintiff may take judgment on the plea of *plene administravit*, and go to trial on the general issue; and where a defendant, having so pleaded, applied for judgment as in case of a nonsuit for

IN this case, the defendant, an executrix, had pleaded the general issue, and *plene administravit præter*. The plaintiff took issue on these pleas. *Justice* having obtained a rule *nisi* for judgment as in case of a nonsuit—

Mansel, on shewing cause, said, he was willing to take judgment of assets *quando* on the plea of *plene administravit*, and to give a peremptory undertaking as to the general issue.

Justice objected to this, and contended that the plaintiff

be a good defence ; if not, they ought not to be prevented from trying.

1833.
LUCAS
v.
JENNER.

Rule discharged on a peremptory undertaking as to the general issue, and a summons to be taken out for withdrawing the replication, and for judgment on the second plea.

WILKINSON v. MALIN.

GOULBURN, Serjt., having obtained a rule for reviewing the Master's taxation—

Adams, Serjt., shewed cause.—The rule was moved on several grounds ; one of which was, that the successful party being entitled to the costs of the second trial only, there having been two trials, the Master had allowed more than the fees actually paid to counsel on the second trial.

Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial, with reference to those given on the first.

BAYLEY, B.—Probably the Master was right in not confining himself to the fees given on the second trial, but gave a reasonable sum with reference to the fees given on the first trial ; but we think the Master ought not to have allowed more than the fees on the first brief.

The parties then agreed between themselves as to the amount to be paid.

SLADE v. TREW.

WIGHTMAN applied to change the venue from *London* to *Lancashire*. The defendant had borrowed money

borrowed, and to secure it by a mortgage and a deposit of deeds, but it was not stamped—The Court allowed the defendant to change the venue.

Where the plaintiff declared upon a written contract to repay money stamped—The

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from the plaintiff, and given an undertaking, in writing, in the following form, on which the plaintiff declared:—"I have this day borrowed of — *Slade*, 250*l.*, at 5*l. per cent.* interest, and have deposited securities in his hands, and promise to pay it next *July* 1st; and, if not then paid, the said — *Slade* to have a right to call for a mortgage of the premises. Dated *January* 31, 1832. Memorandum, that 50*l.*, since borrowed, is on the same terms." The instrument was unstamped. The Court granted a rule *nisi*.

Jervis shewed cause, and contended that the contract being in writing, the venue could not be changed.

LORD LYNTHURST, C. B.—No authority has been cited for such a general rule. Where an I O U was given, the Court changed the venue, considering it only incidental. We think it comes within the general rule.

Rule absolute.

MOSELEY v. CLARK.

Where the

WHATELY moved for judgment as in case of a non-

the last assizes was a second default, and entitled the defendant to judgment as in case of a nonsuit absolutely.

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BAYLEY, B., suggested whether it was not incumbent on the defendant to try by proviso. Since the 14 G. 2, c. 17, a defendant who gets costs for not proceeding to trial, is not entitled to judgment as in case of a nonsuit, without a new default. *Clarke v. Simpson* (a).

LORD LYNTHURST, C. B.—The 69th rule of H. T. 2 W. 4, is express that no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default. A defendant is entitled to judgment as in case of a nonsuit for a first default, because he cannot take the cause down by proviso; but, after that, they are on an equal footing.

Whately.—What is a default? In *Frampton v. Payne* (b), it was held, that where issue was joined in one term, and there was time to give notice of trial in the same term, the plaintiff was bound to do so, or the defendant might have judgment as in case of a nonsuit.

The Court intimating that there was danger of the rule being discharged, *Whately* accepted the peremptory undertaking.

Rule discharged, on a peremptory undertaking.

(a) 4 Taunt. 591.	<i>Costa v. Ledstone</i> , 2 Id. 558;
(b) 1 H. Bla. 65. But this case seems to be virtually overruled by <i>Baker v. Newman</i> , Id. 123; <i>Du</i>	<i>Prentice v. Blott</i> , 2 Bing. 360, 9 B. Moore, 687, S. C.; and <i>Munt v. Tremanando</i> , 4 T. R. 557.

1833.

GIBSON, Assignee, *v.* HUMPHREY and Another, Sheriffs.

In an action against the sheriff, by assignees of a bankrupt, for seizing and selling the bankrupt's goods, the Court will not interfere in a summary way, to stay proceedings, on the sheriff's paying into Court the sum for which they sold, or restoring them in specie, if there is a dispute about the value of the goods, or if it appears that even on restoring the goods the parties would not be put into as good a situation as they were in before, especially if the sheriff might have applied to the Court under the interpleader act.

THIS was a rule obtained by *Platt*, on behalf of the sheriffs of *London*, calling on the defendant to shew cause why, on paying the sum of 73*l.* into Court, or giving up the goods to the plaintiff, all proceedings should not be stayed. It was an action of trover, by the plaintiff, as assignee of *Bicknell*, a bankrupt, against the defendants, sheriffs of *London*, for wrongfully taking and selling goods of the bankrupt.

W. H. Watson shewed cause.—The fiat of bankruptcy was issued against *Bicknell* on the 15th of last *February*; on the 19th, an amended fiat of bankruptcy issued against him. After notice was given of the bankruptcy to the sheriff, the goods were sold by him, on the 1st of *April*, for 73*l.*; on the same day the assignees commenced this action of trover, and it was not till the 27th that this motion was made. The goods were taken and removed on the 15th of *February*. After a detention of the goods for three months, the Court will not entertain this motion. The bankrupt and the assignees swear that the goods were worth from

to the sale of the premises, that was on the 30th, after the rule.

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 GIBSON
 v.
 HUMPHREY.

BAYLEY, B.—There are cases where the Court has interfered, and ordered the goods to be returned, or the value to be brought into Court; but, under the circumstances of this case, and after a sale, I think we ought not to interfere. The sheriff, instead of selling, might have applied to the Court under the interpleader act.

BOLLAND, B.—Where there has been any uncertainty as to the value, the Court has not been in the habit of interfering.

Rule discharged, without costs.

LAWSON v. ROBINSON.

HUTCHINSON moved to set aside the verdict, which had been given for the plaintiff, and for a new trial, on the ground of irregularity in not giving proper notice of trial. It was an action against an executor. The defendant pleaded the general issue, the statute of limitations, a set-off, and *plene administravit*. The commission-day for the York assizes was March 2nd, and notice of trial was not given till February 27th. We were under terms to take short notice of trial—that means four days. The 58th rule says, “the expression ‘short notice of trial’ shall, in country causes, be taken to mean four days.”

Where, in a country cause, a defendant undertakes to accept short notice of trial, he is entitled to four days' notice before the commission day, although, from the length of the pleadings, issue is not joined soon enough to admit of so many days. The plaintiff having obtained a verdict, with only three days' notice, the defendant being an executor, the Court granted a new trial without an affidavit of merits.

BAYLEY, B.—That may mean four days, if practicable. If you obtain time and prevent the plaintiff giving four days, you may dispense with the rule.

The Court granted a rule *nisi*.

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LAWSON
v.
ROBINSON.

Alexander shewed cause.—Notice of trial was given three days before the commission day at *York*; and that, under the circumstances, is a good notice of trial. The declaration was delivered 'on the 9th of *February*, with six days' time to plead; on the 15th the defendant obtained an order for six days' further time to plead; that was on the terms of pleading issuably, rejoining gratis, and taking short notice of trial. The plaintiff filed his replications on the evening of the 25th, replying the statute of limitations to the plea of set-off, and taking issue on the other pleas; a rejoinder was demanded at the same time. On the 26th nothing was done; on the 27th the rejoinder was delivered, taking issue on the replication; and on the same day, at half past three, the plaintiff delivered the *similiter*, with notice of trial. The agent in town received the issue, but said, he did not know whether the attorney in the country would accept the notice. On the next day we sent down the record. The cause was not tried till some days after the 2nd of *March*; but the attorney in the country never expressed to us that he had any objection to the notice; he ought at least to have returned the issue. There is no affidavit of merits.

taking short notice of trial; that is the same as if you had undertaken to give four days' notice. Though the cause was not tried till after the 2nd, that is nothing, for the time of trying the causes is matter of arrangement. I think there was no waiver.

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 LAWSON
 v.
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The other Barons concurred.

Rule absolute.

MELTON v. HEWITT.

MILLER moved to discharge the defendant out of custody. Judgment, on a *cognovit*, was signed last *July*, and the defendant was chargeable in execution within the first four days of *Michaelmas* Term. An application was made to the plaintiff's attorney by the defendant, to postpone charging him in execution, which was agreed to, upon the defendant's giving a written consent as follows:—"I hereby consent that the plaintiff shall have till next *Easter* Term to charge me in execution, and no advantage shall be taken." On the 1st day of this term, he was brought up and charged in execution. The consent given is a nullity; for, by a rule of Court of 26 & 27 *Geo. 2* (a), no agreement is sufficient to prevent a *supersedeas*, unless it is expressed therein that the proceedings are stayed at the defendant's request: that is not stated in the consent given by the attorney. Before the defendant was actually charged in execution, and after he was superseded, a summons was taken out for his discharge. When the matter was heard before *Vaughan*, B., he expressed an opinion, that if he was satisfied, by affidavit, that the plaintiff's representations were correct, that the attorney had his client's authority to give the consent, he should not grant the

If a defendant is allowed to remain in custody two terms after judgment, without being charged in execution, he thereby becomes supersedeable, and the plaintiff cannot charge him in execution, but must first bring an action on the judgment, and the defendant can then be taken on a *ca. sa.* issued in the second action.

(a) Tidd, 9 ed., 371.

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supersedeas; but the matter stood over for further affidavits, and no judgment was given; we then gave notice of an application to this Court. However the fact may be, the written consent not being expressed to be at the defendant's request, is contrary to the rule of Court, and, therefore, no waiver of the defendant's rights: neither can it be explained by affidavits. The only question is, whether we are now in time to apply. It is a general principle, subject to some qualification, that a prisoner once supersedeable is always so. It is expressly laid down in *Tidd's Practice* (a), "that where a defendant is superseded or supersedeable for want of proceedings before judgment, the plaintiff may, nevertheless, take or charge him in execution at any time after judgment, but he cannot do so if the defendant be superseded or supersedeable for want of being charged in execution." He refers to *Rose v. Christfield* (b). There is no case, after judgment, where a party once superseded has been held chargeable. If supersedeable, and superseded before final judgment, he can be charged after final judgment: if, after final judgment he is supersedeable, though not actually superseded, he cannot be charged in execution afterwards. The reason why a party supersedeable before judgment is chargeable

proposition; and a case of *Clarke v. Venner* is there cited as having decided the same point.

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 }
 MELTON
 v.
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BAYLEY, B.—The question is, whether the nature of the custody is changed.

Platt shewed cause in the first instance.—There is no ground for the distinction which has been taken. Until a party is in execution, in what situation is he? He is merely *ad respondendum*. The detention in the gaoler's books is merely to answer.

BAYLEY, B.—He is in custody on the judgment. The recognizance will shew the nature of the custody.

Platt.—His detention is not *ad satisfaciendum*, but merely to answer. The words “or supersedeable” in the passage cited from *Tidd*, must have crept in by mistake. When supersedeable, the form of the order is to discharge him from something—but when superseded, he is actually discharged from liability to process on that judgment, as far as his body is concerned. But there has been a clear waiver on the part of the defendant. In *March* last, at a time when he was supersedeable, he offered to pay 200*l.* down, and give bills for the remainder, by ten promissory notes of 50*l.* each. On *April* 15th, he was brought up to be charged in execution; and, on the 16th, he again offered to act on the proposal of *March*. When he was brought up to be charged he made no objection, but merely said—I do not owe the money, and he was then duly charged. But, supposing there was no waiver, if the argument for the defendant is correct, it is not possible for the plaintiff to get the benefit of his judgment: his remedy is gone; and, if the plaintiff sues him again, he cannot arrest him. The only irregularity was, the omission to charge him in *Hilary* Term, and that has been waived. The

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cases of *Topping v. Ryan* (a), and *Rose v. Christfield* (b), are authorities against the motion.

The Court took time to consider and consult the other Judges; and, on a subsequent day, the judgment of the Court was delivered by—

BAYLEY, B.—This was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, in consequence of not having been charged in execution in proper time. By a rule of this Court of H. T. 2 W. 4 (c), it is ordered that the plaintiff shall cause the defendant to be charged in execution within two terms inclusive after the trial or judgment, of which the term in or after which the trial was had shall be reckoned one. In this case, an application was made for the discharge of the defendant, because he was not charged in *Hilary* Term, which was the second term. The hearing before *Vaughan*, B., was adjourned, that the defendant might make a further affidavit. The rule of T. T. 26 & 27 *Geo. 2*, was probably not then adverted to, that no consent shall be sufficient to prevent a *supersedeas*, unless it be in writing, and express therein that the proceedings are stayed at the

tempt to charge him in execution, an action of debt was brought on the judgment, and the defendant was taken, and a *ca. sa.* issued in the second action, and the Court held that regular. But, in this case, the question is, whether he can be charged in execution when he is supersedeable after judgment. The distinction taken by Mr. *Tidd* is, that where he is entitled to the *supersedeas* before judgment, that does not take away the plaintiff's right to charge him in execution; but, if entitled to a *supersedeas after judgment*, by reason of not being charged in execution, the only way is, by suing out a new writ in an action, and then by suing out a *capias ad satisfaciendum*: there must be that intermediate step. *Line v. Lowe* (a) is cited as an authority on that point; therefore, if the defendant is entitled to be superseded for want of being charged in execution, the plaintiff is not at liberty to do so. There is no difference between charged and chargeable. *Line v. Lowe* was under the consideration of the Court of *King's Bench*. The defendant was there superseded for want of being charged in execution; *Wigley* referred to several authorities, and the Court took time to consider, and held, that the defendant having been superseded for want of being charged in execution in due time after judgment, he could not afterwards be taken in execution upon the same judgment. It is with great reluctance we have come to this conclusion, for we think it was a gross fraud on the part of the attorney and the defendant; but, looking at the rule, we think the defendant is entitled to be discharged.

Rule absolute (b).

(a) 7 East, 330.

(b) The rule of H. T. 2 W. 4, s. 88, expressly directs, that all prisoners who have been in the custody of the Marshal or Warden, for one month after they are su-

persedeable, although not superseded, shall be forthwith discharged out of the *King's Bench* or *Fleet* prison, as to all such actions in which they are supersedeable.

1833.

MELTON
v.
HEWITT.

Trinity Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

WARD v. BELL

1833.

Where several special counts are inserted on the same agreement, the plaintiff is entitled to a verdict on one count only, and to the costs of that count. A bill of exceptions would lie, if a Judge were to direct that all the counts were proved. Costs of a rule for reviewing a taxation are not given where the mistake is with

THIS was an action on an award. There were seven special counts besides the common ones. At the trial before *Vaughan*, B., the plaintiff having proved his case, it was objected on behalf of the defendant, that the plaintiff, having proved one award only, was entitled to a verdict on one count only. The learned Judge considering all the counts but one in the nature of safety valves, to be used only if occasion should require, gave the plaintiff the choice of counts, but only allowed a verdict to be taken on one. The Master in taxing costs on the *postea* allowed the costs of all the counts.

counts he has a right to enter it. It is true, there was but one award, but the learned Judge thought the plaintiff was entitled to a verdict on all the counts. Some of the special counts were added by leave of the Court, which shewed they thought those counts were not unnecessary. The counts in fact were all proper.

1833.

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BAYLEY, B.—Suppose, at the conclusion of the trial, you had claimed a verdict on all the counts, and a bill of exceptions had been tendered, only one cause of action having been proved?

LORD LYNTHURST, C. B.—How can it be said that all the counts were proved, when there was but one award?

F. Pollock.—There is a reported case before Lord *Wynford*, where the action was brought on five bills of exchange, and there were fifteen counts, and I objected to a verdict on more than five; but the learned Judge thought the verdict might be on all the counts. I certainly did not tender a bill of exceptions.

LORD LYNTHURST, C. B.—It has been held in this Court, that where there is only one agreement, the verdict can be on one count only.

F. Pollock.—At all events, the costs of this application cannot be claimed; it is not surmised that any of the counts are carelessly or improperly put in, and some of them were added under the sanction of a Judge.

LORD LYNTHURST, C. B.—The rule will be absolute, without costs.

Rule absolute, without costs.

1833.

ARCHBISHOP OF CANTERBURY *v.* ROBERTSON.

Where a special case is reserved, the Court cannot turn the special case into a special verdict, unless there is a power expressly reserved for that purpose.

A VERDICT was taken in this action, subject to a special case, which was afterwards argued in this Court, and the Court gave judgment upon it.

The *Solicitor General* now moved that the special case might be turned into a special verdict.

BAYLEY, B.—Is there such a power reserved?

The *Solicitor General*.—No power is expressly reserved, but I submit that the Court has of itself the power to make such an order. I cannot recollect any case upon the point. The Court, most clearly, might, in the first instance, have said, either you must agree to a special verdict, or we will grant a *venire de novo*. It is very necessary that the Court should interfere in this case, as it is one of great difficulty and importance, and on which the Court seemed to entertain great doubts. I therefore hope that the Court will either grant this application, or allow a new trial, or a bill of exceptions.

1833.

MORRIS v. COLES.

WIGHTMAN obtained a rule *nisi* to set aside the service of the writ of summons issued against the defendant, and to stay proceedings, on the ground of the defendant's not having been personally served. A personal service had been sworn to, but the defendant now positively denied it, or that he had ever seen the person who pretended to have served the process: other persons, who swore to being present at the time the service was sworn to have been made, deposed, that the defendant was intoxicated at the time, and that the person who swore to the service threw something down on the ground, and on being asked what it was, said it was a ticket for soup from *Morris* and *Coles*. An *alibi* was sworn to by six persons.

Upon a motion to set aside the service of a summons, however positively the defendant and his witnesses may swear to negative the personal service; yet, if it is left in doubt by the affidavits on the other side, whether there was a sufficient service or not, the Court will not interfere.

Follett shewed cause, and produced affidavits from an equal number of persons, who deposed to facts tending strongly to shew that the defendant must have been personally served, or that a knowledge of the service must have come to him.

Wightman insisted, that, after the positive affidavits he had produced, it was impossible to say that the defendant had been personally served in the way deposed to.

LORD LYNTHURST, C. B.—How can we enter into a controversy upon these facts? In making a motion of this sort, the rule is, you must rely on the strength of your own case: it is impossible to say, on these affidavits, whether you were served or not. The rule must therefore be discharged.

Rule discharged, with costs.

1833.

LEAVER *v.* WHALLEY.

An attorney, who is party to a suit, is not entitled to charge a guinea a day for attending the trial, though he acts as his own attorney, unless it appears that it was necessary he should attend in person.

THIS was an action for the amount of a stationer's bill. The plaintiff lived in *Middlesex*, where the venue was laid. The defendant was an attorney at *Stafford*, and acted as his own attorney in the cause, though he employed an agent in *London*; and when the cause was coming on for trial, he came to *London*, with a witness, and obtained a verdict. The Master, on the taxation of costs, only allowed to the defendant the common expenses of a witness, and of travelling to *London* and back.

Miller now moved, that the Master should review the taxation, contending that the defendant, being an attorney, and acting as such in the cause, was entitled to the allowance usually made to a professional person, of a guinea a day; that if he had employed an attorney, instead of defending in person, that attorney would have been entitled to the usual charge for attendance, and that the defendant was not the less entitled to it, because he was acting as his own attorney.

1833.

WEBB v. LAWRENCE.

MANSEL had obtained a rule *nisi*, for discharging the defendant out of custody, and for setting aside the writ of *capias*, with costs for irregularity. He moved upon four objections—*First*, that the defendant's name was misspelt—*secondly*, that there was no affidavit of debt—*thirdly*, that the writ did not give a sufficient description of the defendant—and *fourthly*, that the indorsement on the writ ought to have had a date to it.

A variance in the name of a defendant in a writ, where it is *idem sonans* with the real name, is not material.

The description of a defendant in the *capias*, as of *Kent Street*, in the county of *Surrey*, without the number of the house, or parish, where situate:—*Held*, sufficient.

The indorsement on the writ need not be dated; and “bail for 40*l.* and upwards,” though uncertain, is sufficient, since the late rule of 1 Reg. Gen. H. T. 2 W. 4, s. 10.

Crowder shewed cause.—The variance in the defendant's name is, that the last syllable is spelt “*rance*,” instead of “*rence*.” but the name being *idem sonans*, the variance is not material.—*Secondly*, it is sworn positively by us, that there is an affidavit of debt.—*Thirdly*, as to the description of the defendant in the writ: the words of the writ are, “take *E. L.* of *Kent Street*, in the county of *Surrey*,” and it is contended, that it should have been “of No. 84, *Kent Street*, in the parish of *St. George the Martyr*, in the county of *Surrey*,” but there is nothing in the form No. 4, given by the act (*a*), which shews, that such particularity is required; it is merely “*C. D.* of ———,” the description here was sufficient to enable the officer to find the defendant, and that is all that can be required. In the case of *Smith's* bail (*b*), “*Chigwell Road*” was held a sufficient description, without any street. The last objection is equally without foundation, as we have followed the form given by the act. In the writ, there is the usual indorsement, “This writ was issued by *E. M.*, of &c.,” and underneath, “Bail by affidavit for 40*l.* and upwards.” No date is necessary.

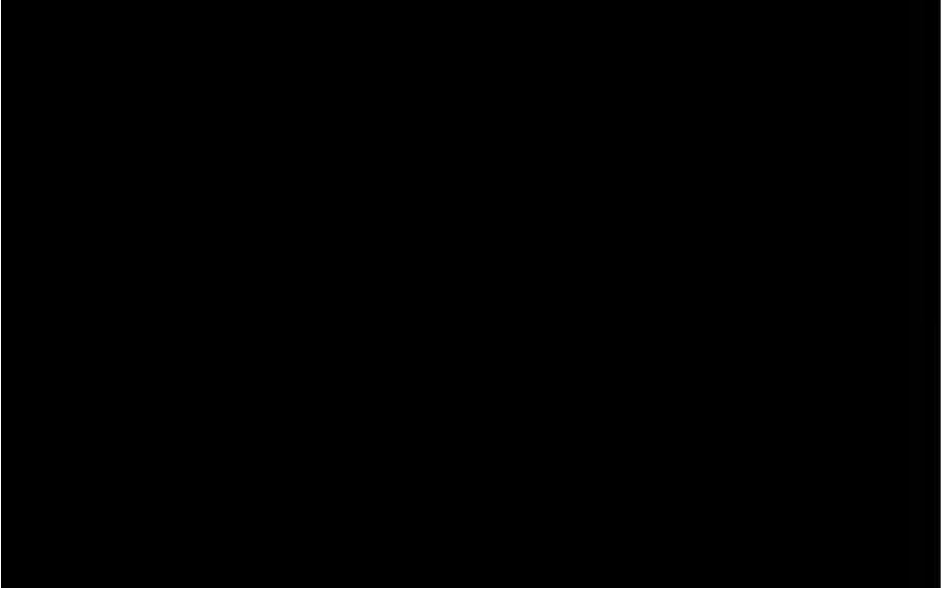
(a) 2 Will. 4, c. 39, Schedule, No. 4.

(b) *Ante*, Vol. 1, p. 499.

1833.
WEBB
v
LAWRENCE.

Mansel, in support of the rule, did not insist on the first point; and contended, that it did not sufficiently appear, that there was an affidavit of debt, for it was positively sworn, that diligent search had been made for the affidavit, but none could be found. At all events, the other objections are fatal. In the form of summons given by the act, the place and county are stated; and if they are necessary and proper in the summons, they are more so in the *capias*; the blank left in the form of the writ of *capias* should be filled up in conformity with the writ of summons. The identical residence should be inserted: "*Kent Street, in the Borough of Southwark,*" might perhaps have sufficed. The date ought also to have been put to the indorsement, and in practice it usually is so; but the indorsement is defective in another respect: "bail for 40*l.* and upwards" is uncertain; and if the affidavit of debt is in that form, it would be clearly bad for uncertainty: it is therefore bad, as a direction to the officer; for the defendant may be arrested for an indefinite sum.

Crowder.—The words in the form are "bail for ——— by affidavit." The indorsement on the writ is "bail for 40*l.* and upwards, by affidavit." There is every thing therefore that the act requires.



VAUGHAN, B.—I think the parish was not necessary to be stated. The indorsement was intended as a summary of the affidavit of debt.

Rule discharged with costs.

1833.
WEBB
v.
LAWRENCE.

WILSON v. TUCKER.

THE time for pleading in this action having expired, the defendant, on the evening before the last day but one of the term, demurred generally to the declaration. The declaration had been delivered early in the term. The Court, under these circumstances, upon the application of *Butt*, for the plaintiff, granted a concilium, and ordered it to be argued at the rising of the Court on the next day. It was suggested, that the demurrer was merely for delay, as there was no pretence for the it; books were delivered to the Judges.

Where a defendant, two days before the end of a term, demurs to a declaration, for the purpose of gaining time, the Court will allow the demurrer to be set down for argument on the last day of the term, and the defendant will not be allowed to withdraw the demurrer and plead the general issue.

Cowling, on the last day of the term, without attempting to support the demurrer, applied for leave to withdraw it, and plead the general issue.

The Court, however, refused to allow this to be done; and said, that no indulgence could be granted in such a case; and they gave—

Judgment for the plaintiff (*a*).

(*a*) In *Williams v. Owen*, where the defendant pleaded *nil debet* to debt on bond, and the plaintiff demurred, the Court, on the motion

of *Richards*, for the plaintiff, granted a concilium for argument on the following day. T. T. 1833.

1833.

MOLYNEUX v. BROWNE.

Where a prisoner petitioned the Insolvent Court to be discharged, but took no further steps, either by filing his schedule within fourteen days, or giving notice to the plaintiff, and the plaintiff did not declare against him within two terms:—*Held*, that he was not entitled to be discharged out of custody.

ERLE shewed cause against a rule obtained by *Mansel*, for discharging the defendant out of custody, on entering a common appearance, for not having been declared against in due time. The defendant was arrested, on the 27th of *September*, on an *alias special capias*, returnable on the 2nd of *November*. He was committed on *November* 3rd, in this action. In *December*, he filed his petition, to be discharged under the insolvent act. The act of 7 *Geo.* 4, c. 57, s. 15, makes the filing a petition have the effect of rendering the defendant unsupersedeable. Notice was not given to the plaintiff, but the plaintiff knew of it. The defendant did not file his schedule within fourteen days; and it is contended, that the petition fell to the ground; but the Court has a discretion, and has given leave to file a schedule after ten months. There is no provision in the act making it null and void; but the 40th section gives power to the Court, to allow it to be filed within such further time after the fortnight as the Court shall think reasonable, and the 11th section also gives power to dismiss the petition; but it has not been dismissed, and, therefore, it is now actually available. This

ble, or discharged out of custody at the suit of such plaintiff, from the time of such notice given." But this rule only applied where notice was given to the plaintiff. The words of the act (a) are, "such prisoner *shall*, within fourteen days, file a schedule." The 42nd section provides, that notice shall be given to each of the creditors of the filing of the petition and schedule. Unless the Court makes a special order, the petition is at an end. Here there was nothing but a petition filed, but no notice was given, and no schedule was filed; the proceedings are thereby rendered inoperative. He cited *Genlick v. Ballinger* (b). No adjudication can now take place in the petition.

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BAYLEY, B.—The 7 *Geo.* 4, c. 57, s. 15, provides, "that no prisoner, who shall have petitioned the Court for relief, shall, after the filing of his petition, be discharged out of custody as to any action for any debt, with respect to which an adjudication in the matter of such petition can, under the provisions of the act, be made, by reason of any supersedeas, for want of the plaintiff's proceeding in such action." The words of the act, respecting the filing the petition and schedule, are directory, and I think this case comes within the words of it. There is still a valid petition on the files, and the Court may proceed to adjudication. The rule of Court of *Easter* Term, 3 *Geo.* 4, was before the insolvent act passed. The filing the petition is evidence that he meant to take advantage of the act; and an adjudication might have been made of the plaintiff's debt.

Rule discharged without costs; or the costs
 to be costs in the cause.

(a) Sect. 40.

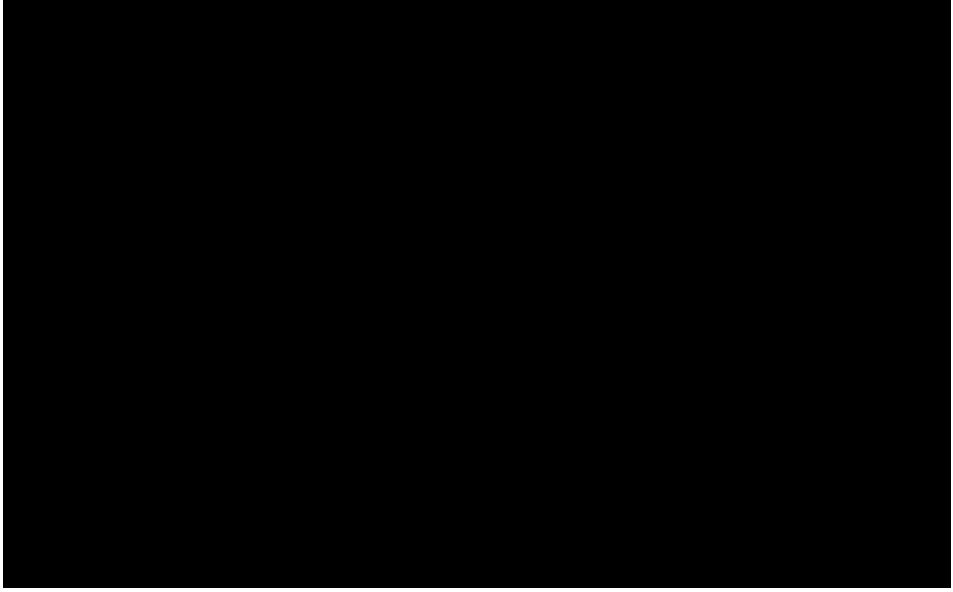
(b) 10 Price, 124.

1833.
—GOUBOT *v.* DE CROUY.

The Court will not try, on affidavits, whether the return made by a sheriff to a writ is false, even though a strong case is made out shewing fraud and collusion, but the party must resort to his remedy by action.

A WRIT of *capias* having been issued against the defendant, the sheriff made the following return: "I humbly certify and return, that the within-named *Henry Count de Crouy*, at the time of the delivery of this writ to me, to wit, on the 14th of *February* last, and from that time until the 18th of *February* last, was not found in my bailiwick; and that the said *Henry Count de Crouy*, on the said last-mentioned day, and from that time till now, was, and is, in the service of *Count Ludolf*, the *Sicilian Minister* at the *British Court*, as domestic servant to the said Minister; and therefore I could not, and cannot now, take the said *Henry Count de Crouy*, as within I am commanded."

Busby applied to set aside this return, and that the sheriff might be directed to execute the writ, notwithstanding the defendant's claim of privilege. He moved this upon several special affidavits, which alleged the defendant to be in trade; that the plaintiff, when he dealt with him, had no knowledge of his being privileged; that



1833.

WARD v. THOMAS, Executor.

THIS was an action of debt on a bond, given by the defendant's testator. The defendant pleaded *non est factum*. At the trial at the last York assizes, the plaintiff obtained a verdict. An order for immediate execution was given by Alderson, J., before whom the cause was tried. A *fi. facias*, for the debt and costs, was issued against the goods of the defendant, who paid the money under protest.

Where judgment is obtained against an executor, in an action on the bond of his testator, execution cannot be issued in the first instance against the goods of the executor, although he has been guilty of a *devastavit*, and has no goods of the testator in his hands; but an action must first be brought suggesting a *devastavit*.

J. Jervis having obtained a rule *nisi* for setting aside the judgment and execution, and for returning the money, on the ground that the *fi. fa.* for the debt should have issued against the goods of the testator, and for the damages against the testator's goods, if there were sufficient, or, if not, then against the defendant's own goods—

Wightman now shewed cause.—The defendant, by pleading *non est factum* only, has admitted assets, and therefore we are entitled to have execution against the defendant's own goods, if there are not sufficient goods of the testator; it is sworn that the defendant has said, that he had no assets, and also that he has offered to pay the debt; it was mercy therefore to the defendant, to issue execution against him, instead of proceeding by the circuitous and expensive course of an action on the judgment.

Per Curiam.—The regular course would have been, to have had judgment for the debt and costs to be levied of the goods of the testator in the hands of the defendant; and if there were not sufficient, then the costs to be levied of the defendant's own goods. Before the defendant could be liable for the debt *de bonis propriis*, there must be an action suggesting a *devastavit*; and the pleading a false

1833.
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 WARD
 v.
 THOMAS.

plea would be evidence of it; but the judgment, as it is now, is erroneous, and would be reversed on error; and the defendant would be restored to every thing he has lost. The rule must therefore be made absolute.

Rule absolute with costs, and no action to be brought.

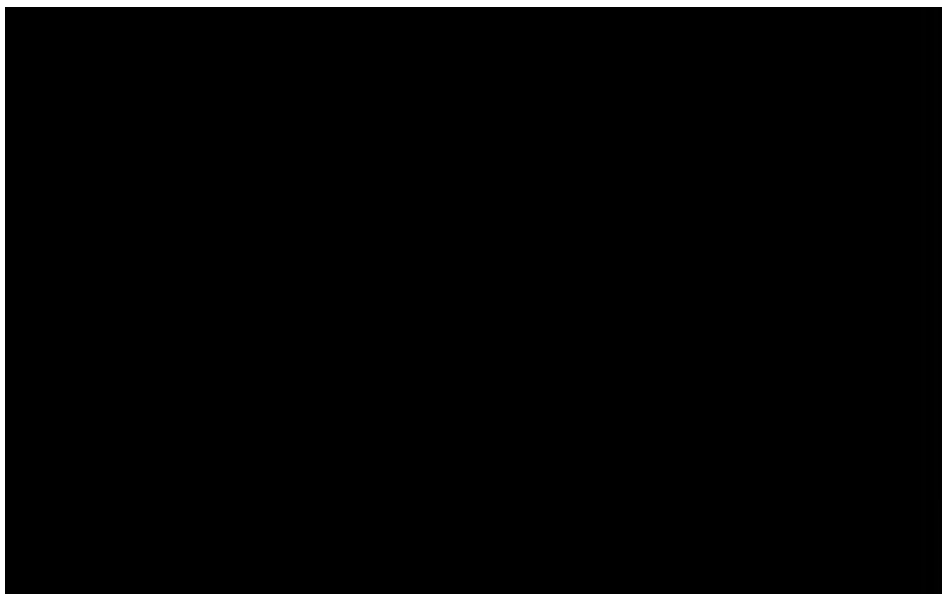


DARKER v. DARKER.

It is too late to deliver paper books on *Saturday* evening, for an argument on *Monday* morning.

THIS was a case in the special paper. *Jervis* was proceeding to argue it, when the Lord Chief Baron said, that paper books had not been delivered in proper time. They were not delivered till late on *Saturday*; and that, he said, was too late for an argument on the next *Monday* morning. The Lord Chief Baron observed, that the rule respecting the delivery of paper books was one of great convenience and importance, and must be strictly enforced. The case would not therefore be heard.

The case was struck out and ordered to be put in the next paper.



1833.

DOE *d.* WILLIAMS *v.* ROE.

KNOWLES moved for judgment against the casual ejector. The service was stated to be on the wife, without stating it to have been "on the premises," or that she lived with her husband.

Service of declaration in ejectment is not sufficient on the wife, unless it is stated to have been on the premises, or that she was living with her husband.

BAYLEY, B.—That will not do.

Knowles.—Perhaps the Court will allow cause to be shewn at chambers, or that the rule may be drawn up conditionally.

BAYLEY, B.—We cannot allow that.

Rule refused.

NEAL *v.* RICHARDSON.

THIS was an action on the case for slander. The defendant pleaded the general issue. The plaintiff demurred specially, and alleged for cause, that the plea was intitled of *April*, 1832, instead of 1833.

A plea having been demurred to, because it was dated 1832, instead of 1833, the Court ordered the demurrer to be set aside with costs.

Kelly now moved that the demurrer might be set aside, and that the plaintiff's attorney should pay the costs. He produced an affidavit of three persons, one of whom drew the plea and another copied it, that they believed it was correctly dated 1833. A summons had been taken out to amend the plea on payment of costs. The summons was attended before *Gurney*, B., when the defendant's attorney asked to see the plea; but the learned Judge said it was unnecessary, as he hoped no one would dare to demur under these circumstances. An application was afterwards

1833.
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 NEAL
 v.
 RICHARDSON.

made for an inspection of the plea, but it was refused to be shewn, except before the Master; it was then alleged to have been mislaid. The defendant's attorney swore, he believed the plea had been altered. It was also objected, that the name put to the plea was believed to be fictitious, as no such person could be found. The Court granted a rule *nisi* for setting aside the demurrer, and that the plaintiff's attorney should attend with the plea, and answer the matters of the affidavit.

Platt shewed cause.—He produced an affidavit of the plaintiff's attorney, that instructions for the demurrer were laid before Mr. *Chadwick*, by whom the plea was drawn and signed; that he was admitted in 1785, and lived at *Bishop's Walk, Bishop's Palace, Lambeth*. It was now sworn that the plea was lost.

The Court ordered the rule to be made absolute, with costs.

Rule absolute, with costs (a).

(a) See *Marshall v. Thomas*, 3 Moore & Scott, 98, and *Anderson v. Thomas*, 9 Bing. 678, where the Court of Common Bench held that a demurrer, but a mere irregularity, that the declaration did not, in the commencement, state the nature of the action, or that the

has expired, and payment of which said goods was guaranteed by the defendant to the said plaintiff; and for money paid by the plaintiff to and for the use of the said defendant, at his request; and for money had and received by the defendant for the use of the plaintiff; and also, for money due and owing from the defendant to the plaintiff, upon an account stated between them."

1833.
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ANGUS
v.
ROBILLIARD.

J. Jervis moved to discharge the defendant out of custody and enter an *exoneretur*, on the ground of the insufficiency of the affidavit. He objected that it did not sufficiently appear, by the affidavit, that the defendant was liable to be arrested, inasmuch as the terms on which the defendant guaranteed the payment of the goods were not stated: and, it did not appear, that the credit on which the defendant guaranteed the goods had expired.

Whitcombe shewed cause, and cited *Cope v. Joseph (a)*, where it was held, that the defendant, who had guaranteed to the plaintiff the payment of money for goods to be sold and delivered to a third person, might be arrested for the amount of goods sold and delivered on the common affidavit.

The Court held that the affidavit was not sufficiently certain, and made the rule absolute.

Rule absolute, without costs, and no action.

(a) 9 Price, 155.

1838.

Ex parte DICAS.

Affidavits, used to ground a motion, ought always to be filed, whether the motion is granted or refused.

A MOTION was made by *Erle* respecting an attorney of this Court, which was refused. He moved upon affidavits.

Mansel now applied to the Court that the affidavits might be filed. Copies had been applied for and refused.

GURNEY, B.—Affidavits ought always to be filed. Every motion is on reading the affidavit.

BAYLEY, B.—There was a time when every affidavit used to be read in Court.

The Court granted a rule *nisi*, and the attorney was directed to attend with the affidavits. On a subsequent day the attorney attended with the affidavits, and gave them to the officer.

BAYLEY, B.—Whenever affidavits are used in Court, they ought invariably to be filed and handed in by the gentleman who moved, and not handed back to the attorney. Whether the Court grants a motion upon affidavit

1833.

THOMPSON v. DICAS and Another.

MANSEL had obtained a rule for setting aside the declaration with costs.

Chilton shewed cause.—The objection is, that the declaration varies from the process, but the affidavit does not point out the irregularity; if there is any, it is in the writ and not in the declaration. The affidavit states that the defendant was served with the writ of summons hereunto annexed, marked (A). The application, therefore, is not on the ground that the declaration has been delivered without process, for the process is stated. The declaration being in trespass, and the writ in trespass on the case, the true cause of action must be taken to have been disclosed in the declaration. It is not shewn that no writ has been issued to warrant the declaration; but the affidavit merely states, that a writ has been served, which does not agree with the declaration.

Where the writ was in trespass, and the declaration trespass on the case, the Court set aside the declaration for irregularity.

The writ is now the commencement of the action for all purposes.

Where libellous and impertinent matter was introduced into an affidavit in support of a rule, the Court deprived the party of the costs of the rule, to which otherwise he would have been entitled.

BAYLEY, B.—What process is there to warrant the declaration?

Chilton.—Before the act, this declaration could not have been set aside for a variance.

BAYLEY, B.—The writ was considered only as process.

Chilton.—Even by original, the declaration could not be set aside for a variance; but coupling the provisions of the uniformity act (a) with the schedule, it is said the writ must correspond with the declaration. In the case of *King v. Skiffington* (b), it was held, that the writ must pre-

(a) 2 W. 4, c. 39.

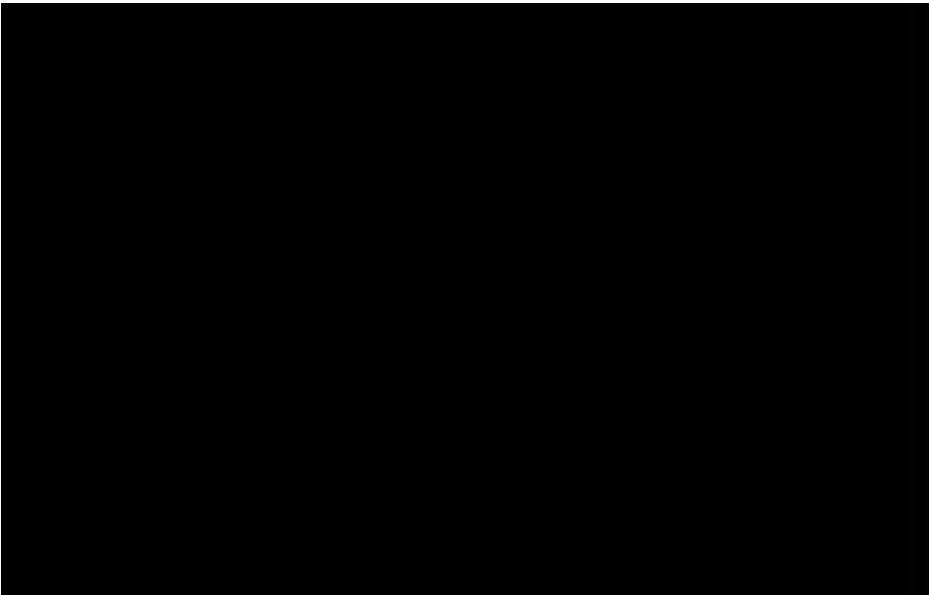
(b) 1 Dowl. Prac. Rep. 686.

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THOMPSON
v.
DICAS.

serve the form in the act; and that it was not sufficient to give the genus only, but the species of action must also be specified. There was a case this term argued in the *King's Bench* on special demurrer: the declaration was in *assumpsit*, and stated, that the defendant had been summoned to answer the plaintiff in an action of trespass on the case; the cause of demurrer was, that, as the process was set out, there was a variance shewn between the process and the declaration; but the Court held, that a demurrer would not lie, and that the motion should be to set aside the proceedings. The motion, here, should have been to set aside the writ.

BAYLEY, B.—The writ is good; it in itself complies with the act, but it does not justify the form of the declaration. A variance appears between the writ and declaration; if you apply to set aside the declaration, the writ remains; if you were to move to set aside the writ, the motion would fail. It cannot be taken advantage of on demurrer, because it is a mere irregularity.

Chilton.—When a party comes to complain of an irregularity in the declaration's not agreeing with the process, it ought to be positively sworn that there is no other



service, because it was not dated; the writ was irregular, and the Court there held, that, as the objection applied to the writ as well as the copy, I could not move to set aside the service without setting aside the writ also. Here the writ and declaration are both good upon the face of them.

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DICAR.

BAYLEY, B.—In that case, the objection was to the writ and not the service, for the service was good but the writ was not. Under the uniformity of process act, you must state the nature of the action, and you must shew that the declaration is conformable. The writ is trespass on the case, but the declaration is trespass, the process only warranting an action of trespass on the case. The declaration must be set aside; and if the plaintiff can declare properly under the writ, he may do so.

The other Barons concurred.

IN the course of the argument, *Chilton* pointed out to the Court that the affidavit, on which the rule had been obtained, contained a great deal of matter respecting an action for what was denominated a foul libel, brought against *Gregory* and Others, where the plaintiff recovered 300*l.* damages, &c., being quite irrelevant to the motion before the Court.

The Court ordered that the affidavits should be referred to the Master, who should report respecting the unnecessary matter; and the costs of the rule were ordered to stand over for that purpose.

The Master, on a subsequent day, reported to the Court, that the matter objected to appeared to him to be irregular and impertinent.

1833.
 THOMPSON
 v.
 DICAS.

Lord LYNDHURST, C. B.—It appears to me to be irrelevant, impertinent, and libellous, and the rule therefore will be absolute, without costs.

Rule absolute, without costs.

HORTON *v.* The Inhabitants of the Hundred of STAMFORD.

In an action against the inhabitants of a place for damage done by a mob under the 7 & 8 G. 4, c. 31, the Court allowed the proceedings to be amended by substituting the word "borough" for "hundred," there being no such hundred, and the time for commencing a fresh action having expired.

HILDYARD shewed cause against a rule obtained by *Kelly*, for amending the proceedings in this action. This is an action to recover the amount of the damage done at an election; it is brought against the inhabitants of the hundred of *Stamford*, and the amendment prayed is, that the borough of *Stamford* may be substituted for the hundred of *Stamford*; part of *Stamford* is in *Lincolnshire*, and part in *Northamptonshire*, but the borough is wholly in one county; they have, therefore, commenced their action against the wrong persons, and ought to commence *de novo*. This is such a substantial alteration as the Court has no power to make, for the act makes a distinction between hundreds and places not in hundreds. It is said, they are out of time to commence a fresh action, but

merly the proceeding must have been by original, and the process by *capias* is of the same nature; and there is nothing to amend by. It is not a misprision of the clerk, but a substantial alteration. The question is, whether any plea of misnomer could have been pleaded.

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HORTON
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BAYLEY, B.—That perhaps would have been a fatal objection.

Hildyard.—In the case of *The Mayor and Burgesses of Lynne Regis (a)*, where the letters patent granted to a corporation had the words “*per idem nomen et non per aliud*,” it was held, that it was not necessary, in setting out the name, that it should be *idem syllabis seu verbis*, but it was sufficient if it was *idem re et sensu*.

BAYLEY, B.—This is *idem re et sensu*. You are the inhabitants of a district of *Stamford*.

Hildyard.—As the inhabitants lie in two counties, there is no remedy against them.

BAYLEY, B.—We ought not to stop the cause in limine, and prevent them from trying that important question.

Hildyard.—The application also comes too late; for, *Easter Term* has been allowed to go by without applying; and the Court will not be disposed to favour the plaintiff in a case of this nature, where there must have been gross negligence in not ascertaining the limits of the borough.

Kelly in support of the rule.—This is an application to the indulgence of the Court; but they have clearly the power to make the alteration, for alterations of a more

(a) 10 Coke, 124 a.

1833.
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 v.
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substantial nature have been made: an application was granted the day before the trial to strike out the names of two defendants; and, in a late case of *Baker v. Neaver* (a), where an action was brought by two assignees of a bankrupt, the proceedings were amended, by adding the name of a third. [He was then stopped by the Court.]

BAYLEY, B.—This application ought to be granted. This action appears to be brought against the inhabitants of the hundred of *Stamford*; but, in substance, it is against the inhabitants of *Stamford*. The remedy is given to the plaintiff by act of parliament (b). The plaintiff has called it a hundred; he now finds it to be a borough; the act says, the borough shall be liable, where not parcel of any hundred: the plaintiff has made a mistake in the description of the district. The application is to prevent the cause going off otherwise than on the merits, and it would be gross injustice not to allow it: and here they would be too late to commence another action. Amendments are allowed in penal actions. In some cases, where the misnomer has been pleaded, applications to amend have been entertained. If this had been by original, though the Court could not have altered the original writ, they could

in hundreds and in counties of cities and towns, as when it is done in liberties, franchises, cities, towns, and places not being part of any hundred. It was the object of the act to give relief wherever the damage was done. Though the act is highly penal in one respect, it is highly remedial in another.

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 the Hundred of
 STAMFORD.

The other Barons concurred.

Rule absolute—the defendants to have a fortnight's time to plead, and costs.

—◆—
 GREEN v. PROSSER.

THESSIGER shewed cause against a rule which had been obtained by *Platt*, that service at Mr. *Miller's* apartments might be good service, and that *Miller* might pay the costs.—This is to procure an attachment where there has not been personal service. Two bills for business done by *Miller* as an attorney were taxed by the Master, and Mr. *Miller* was found to have been overpaid 62*l.*, which he was requested to refund. The order for taxing having been made a rule of Court, an appointment was made to serve *Miller* with it, but he did not attend: several other attempts, it is sworn, have been made to serve him without effect; and they further swear, that they believe he keeps out of the way to avoid being served. All *Miller's* clerks, however, now deny knowing any thing of any calls having been made at *Miller's* chambers respecting the costs; and they positively swear that no copy of the rule has ever been left, and *Miller* himself explains his not keeping to the appointment, by having been unwell. But the Court has not the power to dispense with personal service. In an anonymous case in *Chitty's Reports* (a), it

Where a person keeps out of the way to avoid being served personally with a rule, preparatory to obtaining an attachment against him, and it is clearly made out to the satisfaction of the Court, the Court will dispense with personal service.

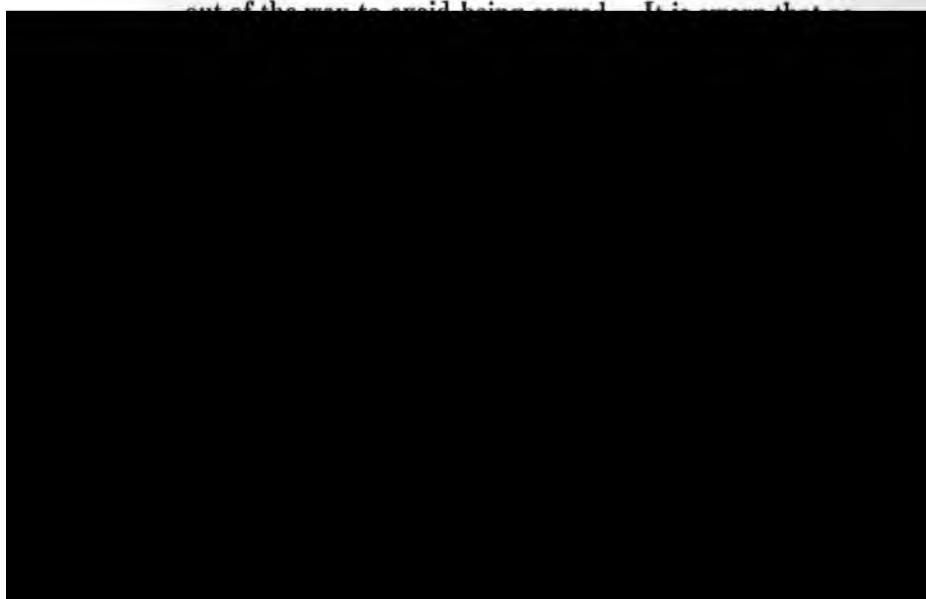
(a) 1 Chit. Rep. 503.

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 PROSSER.

was expressly decided, that the Court would not grant a rule to dispense with personal service of the Master's *allocatur* for costs, with a view to an attachment, on an affidavit that the defendant kept out of the way to avoid being served; and *Abbott, C. J.*, there says, "I know of no instance of a similar application, and unless some authority is cited to support it, I think we ought not to grant this application." In another case, the Court of *King's Bench* refused a rule for an attachment against an attorney for not paying money, where there was no personal service, though it was sworn that the party kept out of the way to avoid service: and the Court there said, that, in matters of attachment, personal service could not be dispensed with. Another case occurred yesterday before Mr. Justice *Patteson*, in the Bail Court; where the learned judge said he had searched for precedents of such a proceeding, and had found none. The Court will, therefore, not interfere in this case, when it is left in doubt whether the party's absence was not occasioned by accident or necessity.

Platt, in support of the rule.—Those cases will not govern the present; for, personal service has been constantly dispensed with. There can be no doubt that the party keeps

out of the way to avoid being served. It is sworn that



the Court, could dispense with the necessity of personal service; but they thought this was such a case, and that the rule should be made absolute, the attachment to lie in the office for a fortnight.

Rule absolute accordingly.

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PROSSER.

DARLING v. GURNEY and Another.

THIS was an action of *scire facias*, against the two defendants, as bail of one *John Collingwood Tarleton*.

The declaration, of *Easter Term*, 3 *Will.* 4, stated that, theretofore, to wit, on the 13th of *April*, 1333, the plaintiff, a debtor of his present Majesty, came before the Barons of the *Exchequer*, at *Westminster*, by G. K. his attorney, and brought then and there into Court his certain bill against the defendants, in a plea of debt upon recognizance, the tenor of which said writ, followed in these words, that is to say—*Middlesex*, to wit. Be it remembered, that a writ of his present Majesty, under the seal of his *Exchequer*, by the consideration of the Barons here, issued in these words: *William* the Fourth, by the grace of God, &c., to the sheriff of *Middlesex*, greeting: Whereas, &c. The declaration then set out the *scire facias*, which stated judgment for 593*l.* 13*s.* 8*d.* recovered by the plaintiff against *Tarleton*, the recognizance entered into by the defendants, that the original defendant had neither paid the damages, nor rendered himself to prison; and therefore, the sheriff was commanded to make known to the defendants that they should appear on a certain day; the sheriffs return of *nihil* was then stated, and an *alias sci. fa.*

Since the new Process act, the Court, having no jurisdiction by bill: it is demurrable to state that the plaintiff commenced his suit by bill.

Where a defendant demurs to any pleading of the plaintiff, and the Court overrules the demurrer, the defendant is at liberty to object to any of the previous pleadings of the plaintiff, if the objection is stated in the margin of the paper books, but otherwise not.

A judgment may be altered in the same term in which it is given.

To debt on a recognizance of bail, the defendant having pleaded that no *ca. sa.* issued, to

which the plaintiff replied, that a *ca. sa.* did issue directed to the sheriffs of *London*, and the defendant rejoined that the original action was brought in *Middlesex*, and not in *London*, which the plaintiff denied in his surrejoinder, and concluded with a verification by the record:—*Held*, on special demurrer, that the conclusion was proper.

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DARLING
v.
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against the defendants, with the sheriff's return of *scire feci*, the appearance of the defendants, and a prayer of execution against them for the damages. The defendants pleaded, that no writ of *capias ad satisfaciendum* was before the issuing of the *sci. fa.* duly sued out or prosecuted against *Tarleton*, and duly returned.

The plaintiff replied a *ca. sa.* against *Tarleton*, directed to the sheriffs of *London*, with the sheriff's return thereto, concluding with a verification by the record.

The defendants rejoined, that the action against *Tarleton* was brought, and the *venue* laid, in the county of *Middlesex*, and not in the city of *London*, into which the *capias ad satisfaciendum* against *Tarleton* was issued and directed.

The surrejoinder by the plaintiffs stated " that the action by the said plaintiff against the said *John Collingwood Tarleton*, in which the said judgment was so recovered as aforesaid, was brought, and the *venue* therein was laid, in the *City of London*, into which the said writ of *capias ad satisfaciendum* in the said rejoinder mentioned issued. And this the said plaintiff is ready to verify by the record of *Michaelmas Term*, in the third year of the reign of our said lord the King, in the 33rd Roll, and he prays that

for the plaintiff having execution adjudged to him, being partly matter of fact and partly matter of record, the plaintiff should have concluded the said surrejoinder by praying, that these matters should be inquired of by the country, and not by a verification by the record.

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The plaintiff joined in demurrer.

Archbold, in support of the demurrer.—The verification to the surrejoinder should not be by the record but generally, or with a conclusion to the country (a). Whether the action was brought in *London* or *Middlesex*, is a matter of fact.

LORD LYNDHURST, C. B.—The *ca. sa.* was issued into *London*.

Archbold.—That may be irregular. The action was brought in *Middlesex*. The surrejoinder is, that the action is in *London*.

LYNDHURST, C. B.—Why should you select the writ in preference to the place where all the proceedings appear to have been.

Archbold.—Abandoning that ground, the proceedings are bad on general demurrer. The commencement of the action is the writ. The act of parliament (b) makes the writ of summons or *capias* the commencement of the action. Before the new Process act, the plaintiff might consider either the bill or writ the commencement of the action; but now, in this Court, there is no such thing as a

(a) The surrejoinder originally concluded to the country, but, upon demurrer, the plaintiff altered the conclusion to a verification by the record.
(b) 2 W. 4, c. 39.

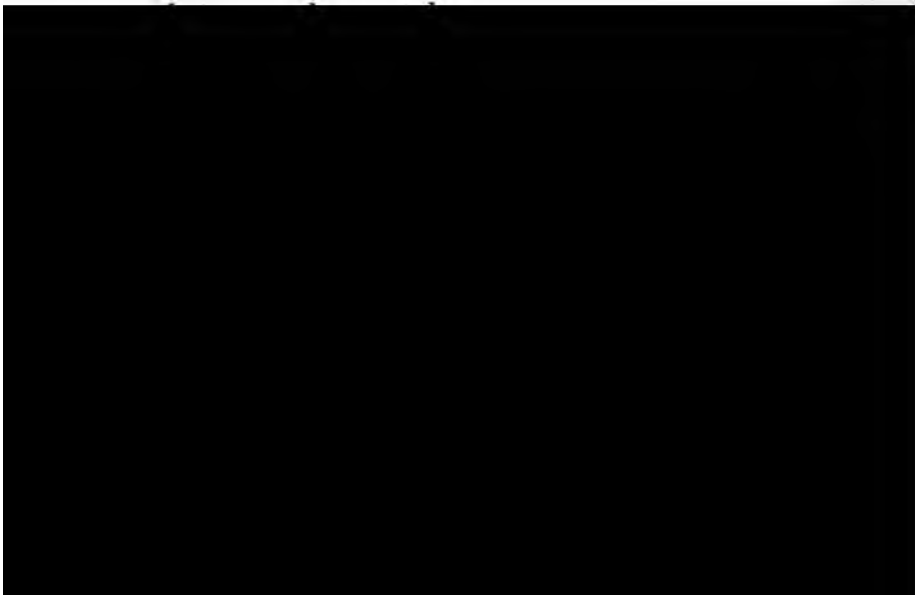
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bill. This Court has no jurisdiction by bill. They have filed a bill instead of a declaration in *sci. fa.*

Busby.—The defendant files a special demurrer to the surrejoinder. The paper books merely mention that objection which is now disposed of. The defendant cannot now go back to the declaration to which he has pleaded. If we had demurred to their pleading, and the Court had decided in our favour, then the other side would have been entitled to revert back to any previous fault. At all events, the objection ought to have been stated in the margin of the paper books.

Archbold contended, that he had a right to go back to the first fault, and that there was no such distinction as that drawn by Mr. *Busby*. He admitted, that according to the rule laid down by Lord *Tenterden*, the objection ought to have been stated in the margin of the paper books.

The Court said, that, in strictness, the point not being stated in the margin of the paper books, the defendant could not avail himself of the objection to the declaration:



recognizance having been entered into; no statement of a judgment having been recovered; the statement of a *scire facias* is only by way of recital; the objection would be fatal upon error. You say, you bring a bill into Court, when in fact you bring only a *scire facias*.

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Lord LYNTHURST, C. B.—Nothing is admitted upon demurrer that is not well pleaded. There is no substantial averment in the declaration. It merely recites a writ of *scire facias*, which recites a recognizance and judgment, and that the sheriff was commanded to make known to the bail that execution would issue against them. The pleadings must be amended, or judgment will be for the defendant.

Busby mentioned, that judgment had actually been signed the day after the Court decided in his favour.

The Court said, that, being in the same term, the judgment might be altered.

Judgment for the defendant, with leave for the plaintiff to amend.

RICE v. LEGH.

KNOWLES shewed cause against a rule obtained by *Hayes*, calling on the plaintiff to shew cause why all proceedings in the action should not be stayed, on payment of the damages, without costs. This was an action for beer delivered to the defendant between *June*, 1831, and *June*,

If a defendant resides or inhabits within *London*, he is liable to be sued in the *London* Court of Requests for debts under 5*l*.; and if a plaintiff

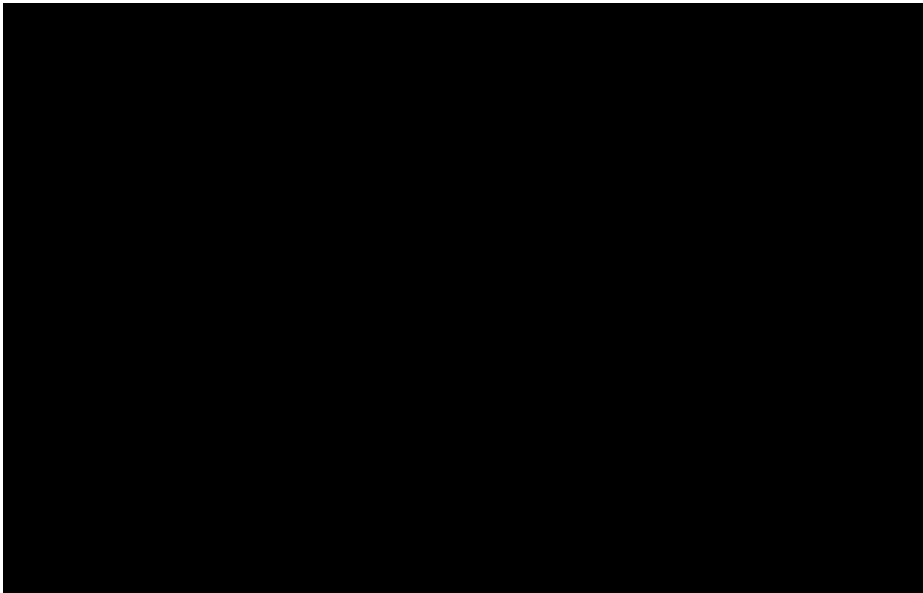
sues him elsewhere, and recovers less, he will not be entitled to costs, though the defendant has another place where he occasionally resides, and the goods are delivered there.

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v.
LEGH.

1832, at his residence, No. 6, *Lansdown Place*, which is in the county of *Middlesex*; the plaintiff recovered 3*l.* 15*s.*, and it is now sworn that the defendant lives in *London*, in *King's Bench Walk*, and liable to be summoned to the City Court of Requests; and it is contended that the plaintiff, therefore, is entitled to no costs under the provisions of the act which established that court. The words of the act (*a*) are, "that it shall be lawful for any person, who shall have a debt owing to him, not exceeding 5*l.*, from any person residing or inhabiting within the city of *London*, or the liberties thereof, to cause such person to be summoned." The defendant is sworn to have resided, and still to reside and live at *Lansdown Place*, where the goods were supplied; and that applications have, from time to time, been made there for the money; it is not sufficient, that the defendant swears he lives in *London*, without adding that he does not live any where else; I submit that the act does not apply to a person having several places of residence.

Lord LYNDHURST, C. B.—You do not negative that the defendant lives in *London*; you only say that the answer at the house in *Lansdown Place* was, that the defendant still resides and sleeps there.



residence in *London*, and another in the country, it is no answer to shew that he sometimes lives in the country. The affidavit is in the usual form.

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LORD LYNTHURST, C. B.—More particulars ought to have been shewn about the residence in *London*; the defendant may go occasionally to chambers, for business, and that may have been thought sufficient to justify him in swearing to residence and inhabitancy in *London*; but I am of opinion, that, if he resides or inhabits within *London*, that is sufficient, though he has two places of abode.

The rest of the Court concurred.

There being a doubt in the minds of the Court about the facts, it was referred to the Master to inquire, subject to the above directions.

FAGG v. BORSLEY.

STEER had obtained a rule *nisi* for setting aside the interlocutory judgment and all subsequent proceedings for irregularity. The declaration was in covenant, and several special pleas were pleaded. Then the plaintiff obtained leave to amend the declaration, with liberty to the defendant to plead *de novo*, or demur; the plaintiff made no alteration in the counts, but added new ones; the new counts were for the same cause of action, but stated the title differently; no new rule to plead, or notice to plead, was given; and though the previous pleas remained, the plaintiff signed judgment. There was an affidavit of merits.

Where a declaration is amended, with liberty for the defendant to plead *de novo*, and the plaintiff merely adds more counts for the same cause of action, if the old pleas apply to the new declaration, the plaintiff cannot sign judgment as for want of a plea, without a rule to plead, or demand of plea.

Watson shewed cause.—It is objected that upon an amended declaration a fresh notice to plead is necessary.

1833.

FAGG
v.
BORSLEY.

BAYLEY, B.—I apprehend not; a new rule to plead is certainly not necessary. Do the special pleas apply to the new breaches?

Watson.—The action is in covenant with special pleas. We added a fresh count. In *Huckvale v. Kendal* (a), a demand of plea was held not be necessary to entitle a party to sign judgment, where, after plea pleaded, the plaintiff amended his declaration.

Steer.—In that case a rule to plead was given. We had leave to plead *de novo*, or demur. They had no right to treat the original pleas as a nullity.

BAYLEY, B.—I have no difficulty in stating, that, if there are pleas pleaded, and the defendant has *liberty* given to plead *de novo*, the former pleas are good, if they apply to the amended declaration.

Rule absolute, costs to be costs in the cause.

(a) 3 B. & Ald. 137.

to have his costs, and that the claimant must pay them. He cited *Bowdler v. Smith* (a), where it was held, that, if the party making the claim did not appear, the Court would bar his claim as against the sheriff, and order him to pay the costs of the judgment creditor's appearance on the rule.

1833.
PERKINS
v.
BURTON.

BAYLEY, B.—The only question is, whether the claimant can be made to pay costs, not having been heard. The clause that gives costs (b) speaks of the third party not appearing, and says that the Court may declare him for ever barred of his claim, and may make such order about costs and other matters as may appear just and reasonable; but the clause does not necessarily import that the claimant not appearing must pay costs. The rule does not call on him to pay costs.

VAUGHAN, B.—My difficulty is, whether the sheriff shall have his costs. His application is under the 6th clause; it is true he is brought here by a claim.

Mansel.—The preceding clauses are in fact incorporated with the sixth (c).

BAYLEY, B.—The proper course will be, that the claimant shall pay the costs of this application, unless he shews cause within four days.

The rule ultimately drawn up, was—that *A. Moore* should be barred of his claim, and that, unless he shewed cause within four days from the service of the rule, he should pay the execution creditor his costs. No costs to be allowed to the sheriff.

(a) *Ante*, vol. 1, 417.
(b) Sect. 3.

(c) See *Anderson v. Calloway*,
ante, Vol. 1, p. 636.

1833.

Ex parte ———.

A verdict having been obtained against an attorney, in an action for publishing a libel of a very aggravated nature, but in which the jury only gave 1*s.* damages, the Court refused to strike him off the roll on the mere ground of the publication of that libel.

Semble—That the Court will not strike an attorney off the roll, unless for some misconduct in his business of attorney, or where criminal proceedings have been taken against him.

ERLE applied for a rule calling upon an attorney to shew cause why he should not be struck off the roll. The affidavit of *Gregory*, on which I move, states that a libel upon him of a very aggravated nature was circulated very generally on *Sunday, August* the 4th; that he brought an action against *Dicas* for the publication of that libel, and obtained a verdict with 1*s.* damages. The affidavit also stated, that, some years before, the defendant had been convicted and imprisoned for three years; and there is an additional fact, that the defendant is sworn to have expressed an intention to placard *Gregory*. The ground of the motion is, the publication, by the defendant, of such a libel.

Lord LYNTHURST, C. B.—The jury have given 1*s.* damages for that. Have you any instance of such an application on a verdict given for the same criminal act, but for which no criminal proceedings have been taken?

Erle.—There is a case before Lord *Ellenborough*, where it had been held, that an indictment would not lie; that

was an instance of an attorney extorting money under the

1833.

ATTORNEY-GENERAL v. HULL and Another.

TOMLINSON applied to put off the trial on account of the absence of *Charles Varnham*, a material and necessary witness for the defence. It was sworn that he had undergone a surgical operation, which had rendered him unable to travel to *Westminster*, and that the defendant could not safely proceed to trial without him.

Where a defendant applies to put off a trial, on account of the absence of a material witness, but does not give notice to the other side till expense has been incurred in bringing up witnesses, the application will only be granted on payment of the expense of the witnesses. It is not necessary that the affidavit in support of such an application should swear to a good defence on the merits; it is sufficient if the witness is sworn to be material and necessary.

Clarke opposed the application, as being intended for delay.—There is no affidavit of a good defence on the merits. No information was given to us till the 8th of *June*; and now, *June* 12th, there is an application to postpone the trial, which is appointed for to-morrow. Thirteen of our witnesses came up from *Scotland* on the 8th, and three more on the 9th.

Lord LYNTHURST, C. B.—It can only be on payment of costs, through their neglect in not giving notice.

BAYLEY, B.—If they had given notice earlier, they would have saved the costs. The affidavit states that the witnesses are material and necessary, and that is sufficient. The master will see which of the witnesses' costs are to be allowed.

Rule granted.

JONES v. FITZADDAMS.

ADDISON, on the last day of the term, applied to the Court to discharge a defendant out of custody, having been confined for twelve months for a debt of 7*l*.

Upon a motion to discharge a prisoner who has been in custody 12 months for a debt under 20*l.*, the Court

has no power to order cause to be shewn at chambers. Notice ought to be given of such a motion; otherwise, only a rule *nisi* will be granted in the first instance.

1833.
JONES
v.
FITZADDAMS.

BAYLEY, B.—Unless notice has been given, you can have only a rule *nisi*.

Addison.—Notice has not been given, but the Court can order that cause may be shown at chambers. The act (a) says that all persons in execution upon any judgment, in whatever Court the same may have been obtained, whether it be a Court of record or not, shall and may, upon application to one of the superior Courts of record, be forthwith discharged. When cause is shewn in vacation, it will relate back to the term; and there will be no danger in allowing it, for, by a subsequent clause, it is provided, that, if it shall appear that the discharge has been fraudulently or unduly obtained, the defendant may be retaken. The twelve months expired on the 12th of *May*.

The Court, however, were of opinion that they had no power by the act to allow cause to be shewn at chambers. The words of the act are, “by rule or order of the Court, upon application in term time.”

Rule *nisi* generally (b).

(a) 48 G. 3, c. 123. (b) See *Kelly v. Dickinson*, *ante*, Vol. 1, p. 546.

BAYLEY, B.—It cannot be known what the issue will be till the plea is pleaded.

1833.
COTTERILL
v.
DIXON.

R. V. Richards.—As the defendant now takes away the privilege of the plaintiff, the defendant ought to pay the costs. No application was made to us to consent.

BAYLEY, B.—If you had not opposed, they would have paid them; now they will be costs in the cause.

Rule absolute, costs to be costs in the cause.

RENDELL v. BAILEY.

THIS was a motion for judgment as in case of a nonsuit, for not proceeding to trial at the last assizes for *Cornwall*. The commission day was on the 22nd. The defendant took out a summons before *Gaselee, J.*, to have the trial put off on account of the absence of a material witness. At the instance of the defendant, the hearing was postponed by the learned Judge from the 12th to the 19th. The plaintiff, thereupon, countermanded notice of trial.

Where a defendant took out a summons for putting off a trial at the assizes so late before the commission day that the plaintiff thought he might be put to inconvenience in getting ready for trial if the order was refused, and therefore countermanded:—*Held*, that the defendant could not move for judgment as in case of a nonsuit as upon a default of the plaintiff.

Platt shewed cause.

Godson, in support of the rule, contended that there had been a default, and that they were entitled to have a peremptory undertaking.

BAYLEY, B.—The words of the act are, “where any issue is joined, and the plaintiff *neglects* to go to trial.” Here the plaintiff was ready, and gave notice of trial, but the defendant applied to postpone the trial. The summons was put off till the 19th: there was then but a very

1833.
 RENDELL
 v.
 BAILEY.

short period before the commission day, and the plaintiff, thinking he should be put to some difficulty in preparing for trial at so short a notice, countermanded; in fact, he only consented to the defendant's application. I think he had a just cause for countermanding.

The other Barons concurred.

Rule discharged.

PRYER v. SMITH, a Prisoner.

Where the declaration is delivered in the term, judgment may now be signed in the following term for want of a plea, without giving a rule to plead of the term of which the judgment is.

THE defendant in this action was a prisoner in *Maidstone* Gaol. The declaration was of last term, and judgment was signed this term for want of a plea.

Busby now moved to set aside the interlocutory judgment, on two grounds: first, that there was no rule to plead of the term of which the judgment was signed, and, secondly, that it was signed against good faith. He contended that the new rules had not taken away the necessity of giving a rule to plead of the term of which judgment was signed.

give four days more. The rule to plead is merely form. There was a similar motion made by Mr. *Richards*, where the declaration was in vacation, and, judgment being signed in the following term, the Court held that a rule to plead of that term was unnecessary.

1833.
 PRYER
 v.
 SMITH.

The Court refused a rule on this ground; but upon the other they granted a rule *nisi*.

SANDLAND v. CLARIDGE.

THIS was a motion to set aside a *scire facias* against bail, and all proceedings thereon, for irregularity. The *ca. sa.* was returnable on the 4th of *May*, and the *scire facias* was tested on the 8th, and the objection was, that the *scire facias* ought to have been tested on the return day. Against the rule were cited *Stewart v. Smith* (a) and *Shivers v. Brooks* (b). In support of the rule were cited, *Tidd's Practice* (c), and *Chitty's Practice*.

The *sci. fa.*
 against bail
 need not be test-
 ed on the re-
 turn day of the
ca. sa.

J. Jervis, in support of the rule.

Crompton, *contra*.

Lord LYNTHURST, C. B.—The Master cannot certify that such is the practice. The cases cited shew that the *scire facias* may be tested on the return day, not that it must. The rule must be discharged.

Notice of the motion had been given, and cause was shewn in the first instance; but, on the application of *Jervis* for time to render the defendant till *Monday* (this being *Saturday*), the Court gave the time, on the terms of paying the costs of the rule.

(a) 2 L. Raym. 1567, Stra. 866, S. C. (b) 8 T. R. 628. (c) P. 1122.

1833.

REX v. The Sheriff of MIDDLESEX, in the case of SHEW v.
WARD.

The Court refused, on behalf of bail to the action, to set aside a regular attachment against the sheriff, upon an affidavit of merits, and on payment of costs, where the rule for the allowance of bail had not been served on the plaintiff's attorney.

It is not necessary for bail, on moving to set aside an attachment, to swear that it is at their expense.

CLEASBY shewed cause against a rule which had been obtained by *Platt*, for setting aside an attachment against the sheriff. He objected, that it did not clearly appear on whose behalf the motion was made, for the rule was drawn up on hearing Mr. *Platt* as counsel for the defendant; but the affidavit, which was made by one of the bail, stated that the motion was made solely to relieve himself and the other bail. The affidavit, he said, was also defective in not alleging that the motion was at the expense of the bail: and he cited *Rex v. The Sheriff of Middlesex (a)*, where it was held in the *King's Bench*, that the affidavit must state that the motion is at the instance and expense of the bail; and *Tidd's Practice (b)* is to the same effect.

Platt.—The rule is drawn up wrong. I applied on behalf of the bail.

Lord LYNTHURST, C. B.—The case referred to was decided upon an express rule of the *King's Bench*, which re-

been complied with, and we want the attachment for the purpose of enforcing that order. An application was also made to Mr. Baron *Gurney*, who refused it, on the ground that it was too late; and now (a) they apply to this Court. It is sworn, on behalf of the bail, that bail was put in and justified on the 13th, but notice of bail was not given till the 10th, being only three days, instead of four; and no rule for allowance was served at all. The attachment against the sheriff was obtained on the 2nd of *May*. At the end of last term, the plaintiff moved for a *habeas corpus*, and now, just as he is on the point of going to *elisors*, an application is made to stay proceedings on paying the costs of the attachment only. If the sheriff is in the wrong, the bail will not be injured by the attachment.

1833.
 REX
 v.
 The Sheriff of
 MIDDLESEX.

Platt, in support of the rule.—This application to *Bolland*, B. was on behalf of the sheriff. It was a conditional order, and, the terms not being complied with, it dropped to the ground. No trial has been lost. This is an application to the indulgence of the Court, and moved on payment of costs. The application to Mr. Baron *Gurney* was on behalf of the bail to the sheriff, before bail above were put in. Such applications on the part of the bail have been granted on payment of costs, without an affidavit of merits. Here, there is such an affidavit.

Lord LYNDHURST, C. B.—The order of *Bolland*, B., was a conditional order, and, it not having been complied with the parties were in the same situation as if it had not been made.

Platt.—As to the other point, that due notice of bail was not given, it is admitted that notice of bail was given on the 10th, to justify on the 13th; and that the plaintiff did not attend to oppose: the bail having been allowed and

(a) May 29th.

1833.
 Rex
 v.
 The Sheriff of
 MIDDLESEX.

justified on the 13th, they should have moved to set aside the allowance, and cannot take the objection now.

Lord LYNDHURST, C. B.—On this last ground, I think the rule must be discharged, with costs to be paid by the party on whose behalf the application was made.

GURNEY, B.—Without allowance, it is no bail. The form is, that bail have been *perfected*; that cannot be without a rule for allowance.

Rule discharged, with costs.

VALLANCE v. ADAMS.

Where, in trespass, the jury found for the defendant upon a plea which went to the whole cause of action, and the Judge thereupon discharged them as to the

THIS was an action of trespass, for knocking down a board, and was tried at the last assizes for *Derby*. One of the pleas was, that it was a nuisance to the public highway. There was also a new assignment, and judgment by default. It clearly appeared that it was a nuisance, and the Judge thereupon discharged the jury as to all the other issues.

though you have not the costs of the issues found neither the one way nor the other.

1833.

VALLANCE
v.
ADAMS.

BAYLEY, B.—You have all the costs on the issues found for you. You are not entitled to the costs of the issues not found for you. Those counts on which there is no finding either one way or the other, do not come within the general costs; neither are you entitled to the expenses of the witnesses who were taken down to speak to the issues on which no verdict was given, for the verdict might have been against you.

Rule refused.

YOUNG v. REDHEAD.

THIS was an action on a promissory note for 100*l*. When the cause was called on, on *May* 3rd, as an undefended cause, *Platt* appeared for the defendant, and stated there was a defence as to 60*l*.; it stood over therefore till the 15th; but when it was called on on that day, no one appearing for the plaintiff, he was nonsuited. A motion was made this term by *Busby*, for the plaintiff, to set aside the nonsuit, and for a new trial on payment of costs, and a rule *nisi* was granted. An arrangement was afterwards come to between the plaintiff and defendant, that the defendant should give a warrant of attorney for the debt and costs. The defendant was then in prison; and when the warrant of attorney was given, Mr. *Howard*, who had been employed by the defendant as his attorney, was not called in; but another attorney was present on his behalf. *Howard*, being informed that a compromise was going on, applied to Messrs. *Cook & Hunter*, the plaintiff's attorneys, to take care his costs were paid, and left for their

Where a plaintiff was nonsuited, and a rule *nisi* was afterwards granted to set aside the nonsuit on payment of costs, and then the parties entered into an arrangement, without the intervention of the defendant's attorney, to settle the action, by the defendant's giving a bill of sale and warrant to the plaintiff for his debt and costs, but without providing for the costs due by the defendant to his attorney, and the attorney thereupon got the rule discharged for setting aside

the nonsuit:—*Held*, he was justified in so doing.


1833.
YOUNG
v.
REDHEAD.

signature a written undertaking to pay them; they, however, declined to do this, but, according to *Howard's* affidavit, promised to pay his taxed costs. An application for the costs was subsequently made to them, without effect; and *Howard* thereupon instructed counsel to shew cause against the rule for a new trial; and, no one appearing in support of it, the rule was discharged.

Busby then obtained a rule *nisi*, on behalf of the plaintiff, calling on the defendant and Mr. *Howard* to shew cause why all proceedings on the judgment of nonsuit should not be set aside, and why Mr. *Howard* should not pay the costs.

Curwood and *Platt* shewed cause.—They produced an affidavit of the defendant, that he would not have come to the arrangement, except on the terms of the plaintiff's paying the costs according to the rule; and contended that the whole transaction was an attempt to cheat Mr. *Howard* of his costs.

Busby, in support of the rule.—A party has a right, if he thinks fit, to settle the action, without the intervention of his attorney, if there is no fraud. Fraud or no fraud



stances, and are distinguishable from the present. *Howard* was the attorney for the defendant; the plaintiff did not appear, and was nonsuited; he then applies to set aside the nonsuit on the payment of costs; of course the costs would be to be paid by the plaintiff to somebody. Those costs would be the costs of Mr. *Howard's* attending at the trial and on the application to set aside the nonsuit. The defendant is a prisoner, and enters into a compromise, neither Mr. *Howard* nor *Cook & Hunter* being present, but another attorney, to comply with the rule. The defendant gives a bill of sale and warrant of attorney, and settles the amount of debt and costs; all that being done behind Mr. *Howard's* back, it is a case of strong suspicion, and looks as if it was done to throw Mr. *Howard* on a needy party to get his costs: I call it behind his back, because he left a notice claiming his costs. A party may waive his right to costs, but it may be done in fraud of the attorney. In *Gould v. Davis* (a), where a party had, behind the back of an attorney, taken a security for the debt and costs, the Court ordered the security to be put into the hands of the attorney. Mr. *Howard* had an interest in the rule for a nonsuit, which was pending; and all parties must have known that there were costs to be paid by the plaintiff, which would go to *Howard*; some provision for these costs ought to have been made. *Howard* being out of town, his clerk left a message and a written undertaking for *Cook & Hunter*, to pay *Howard's* costs when taxed—a plain intimation that he wished *Howard's* interest to be taken care of: and it is most probable that what is stated, that *Cook & Hunter* declined to be responsible, because they would not give a written undertaking, but that they would see them paid, is correct. The defendant says he would not have given a bill of sale and warrant of attorney unless he thought the costs had been

1833.
 YOUNG
 v.
 REDHEAD.

(a) 1 Tyrwh. 382.

1833.
 YOUNG
 v.
 REDHEAD.

provided for. The parties did not deal fairly and properly. When *Howard* found that *Cook & Hunter* would not perform what they had undertaken to do, it seems to me he was justified in discharging the rule. I think the rule ought still to stand as it is, unless the plaintiff pay the costs of shewing cause and attending the trial.

BOLLAND, and GURNEY, Barons, concurred.

Rule discharged, unless the plaintiff pay such costs to Mr. *Howard* as he would have been entitled to receive if the rule had been made absolute for setting aside the nonsuit, and also the costs of shewing cause, and the costs of this rule.

ANONYMOUS.

Issue joined in
Hilary Term,
 in time for a
 trial that term,
 but the plaintiff
 did not proceed:

THIS was a motion for judgment as in case of a nonsuit. It was a town cause, and issue had been joined last *Hilary* Term; and there might have been a trial then, but the cause had never been taken down to trial.

1833.

MORGAN v. WILLIAMS.

THIS was a rule calling on the plaintiff to shew cause why he should not pay the costs incidental to the reference of this cause. The plaintiff was the prothonotary of the Court of Session at *Denbigh*; and this action was brought to recover the sum of 13*l.*, from the defendant, an attorney, for fees due to the plaintiff as prothonotary. The sum claimed was the balance of an account which had been running between the parties from 1821 to the time of bringing the action. At the trial, the cause was by agreement referred to a gentleman in *Wales*, with power to examine the parties themselves; and there was a clause, that, if either party should, by affected delay or otherwise, prevent the arbitrator from making his award, he should pay such costs to the other as the Court should think reasonable and just. The order of reference was made on *February 26th*. The arbitrator appointed the 13th of *April* to proceed with the reference, and both parties entered into an undertaking in writing to attend on that day, and in case either should fail to attend at the time and place appointed, the arbitrator might proceed *ex parte*. The parties attended on that day, but the plaintiff was not prepared with the books or witnesses necessary to prove his case, but was ready to have been examined himself, and at his request the meeting was adjourned; the plaintiff however did not afterwards attend, alleging that he could not procure the books, and refused to make another appointment; and, before an award could be made, the time expired, the arbitrator having no power to enlarge it.

A plaintiff, who submits to arbitration, with a clause that if either party, by affected delay, or otherwise, prevents the arbitrator making an award, is liable to costs, where the arbitrator is prevented from making his award, in consequence of the plaintiff not being prepared with proper evidence, though he is ready to be examined in support of his own case.


Williams shewed cause.—He cited *Ashton v. George (a)*,

(a) 2 B. & Ald. 395, S. C. 1 Chit. R. 204.

1833.
MORGAN
v.
WILLIAMS.

that a party is not liable to costs, as having by affected delay, or otherwise, prevented the making of the award, where he revokes the submission for a reasonable cause, as, for the non-attendance of necessary witnesses. There must be some wilful misconduct on the part of the plaintiff. The plaintiff's account consisted of a great number of items, and the defendant put the plaintiff upon proof of every one of them; this he could not do, without producing several hundred records, from different parts, which could not be procured; he produced several books of accounts kept by himself and his deputy, shewing what was due; other books of account were produced, containing entries made by different persons, some of whom were gone away, and others at a great distance. The plaintiff might have been examined himself, as there was a power to do so; and in *Warne v. Bryant (a)*, it was held, that an award was good, though the plaintiff was the only witness examined in support of his own case. Here the plaintiff was ready to be examined, and it cannot therefore be said that he was guilty of wilful misconduct.

J. Jervis, in support of the rule.—In *Ashton v. George*, it appeared that the witnesses would not come, and on that account only the submission was revoked. The



BAYLEY, B.—I think the plaintiff ought to pay the costs of the reference. He comes totally unprepared with the necessary proofs. An expense is uselessly incurred, and all falls to the ground, and the plaintiff positively refuses to make another appointment. *Ashton v. George* is a very different case; there several witnesses were wanted, whose expenses were tendered, but they refused to attend. I think the arbitrator did right in saying he would not examine the plaintiff to prove his own case; he might have called the defendant to prove whether certain business was or was not done; but not the plaintiff, in support of his own case. In *Warne v. Bryant*, the Court would not enter into the question, as it is for the discretion of the arbitrator.

1833.
MORGAN
v.
WILLIAMS.

VAUGHAN, B.—The plaintiff might have come better prepared.

Rule absolute (a).

(a) See *Morgan v. Williams*, 1 s. 39, the power of the arbitrator cannot be revoked, except by the leave of the Court. Dowl. P. C. 611, where the arbitrator examined the plaintiff. By the late act of 3 & 4 Will. 4, c. 42,

HALE v. BAKER.

THIS was an action to recover for business done by the plaintiff for the defendant, as a valuer. On the 27th of *February*, after the action was commenced, a summons was taken out to stay proceedings, on payment of the sum of 20*l.*, and costs; but the plaintiff opposed it, as he claimed 46*l.* 5*s.*;

Where a defendant took out a summons to stay proceedings on payment of a certain sum with costs, and the plaintiff refused to accept it, but after-

wards, when the money was paid in under a rule of Court, took it out and discontinued;—*Held*, that the plaintiff was only entitled to costs up to the time of the first offer, though he stated as a reason for not proceeding, that he could not find a material witness.

1833.

HALE
v.
BAKER.

and no order was made. A declaration was then delivered, and the defendant took out another summons why all proceedings should not be stayed on payment of 20*l.*, with the costs up to *February 27th*, which came on before *Gaselee, J.*, on *May* the 4th; but the plaintiff still declining to take it, the learned Judge recommended the defendant to pay that sum into Court; 20*l.* was accordingly paid in on the usual rule, and since then issue was joined, and the cause stood for trial; but the plaintiff obtained a rule to discontinue, and took the 20*l.* out of Court. The Master taxed the plaintiff's costs up to the 4th of *May*.

Chilton now moved that the Master might review his taxation, by allowing the defendant his costs from the 27th of *February*, which would give him the costs of the declaration and plea.

Platt shewed cause.—The plaintiff's claim was for valuing, and it is sworn that the charges were reasonable, and that no tender was ever made; and two days before the cause was tried, we inquired if the defendant had delivered his briefs, because we had not been able to procure the attendance of a witness, and on that account we dis-

continued. The Master has taxed the costs only up to the

cepted by the plaintiff when the defendant pays it in the usual manner, does not necessarily deprive the plaintiff of his right to costs up to the time of the money being paid into Court. There the Chief Baron said, he considered, that, in order to succeed in an application of this sort, it ought to be shewn to the satisfaction of the Court that the money which had been paid in was all that was really due, or that there was good reason for thinking so. That was where the parties were in the same situation; here an event subsequently happened, which we could not be prepared for, which was, our inability to procure a witness; and the defendant does not swear that no more was due than he offered.

1833.

HALE
v.
BAKER.

BAYLEY, B.—It is a great object, in cases of this nature, to have an uniformity of practice. *James v. Raggett* (a) is, in substance, in favour of the defendant. There is no affidavit of how much is due; the plaintiff may have claimed according to an arbitrary rule, and a jury might have thought it very unreasonable. In *February* you reject 20*l.*, and then, after incurring expense, take it, and give no satisfactory reason for proceeding after the 27th of *February*. As to the absence of the witness, it is not shewn whether inquiries have been made after him, or that any attempts have been made to find him. This is different from the case in *Price*, because the Court there entered into the circumstances of the case, and they thought that a good cause was shewn for the plaintiff's conduct.

BOLLAND, B.—It is not usual to swear that no more was due. This is not like a demand for a certain sum; the claim depends on the amount charged by an appraiser. I think the affidavit should have stated that the reason for not going to trial was, the inability to procure the

(a) 2 B. & Ald. 776.

1833.

HALE

v.

BAKER.

attendance of the witness, and also what endeavours had been made to find him.

VAUGHAN, B.—If the amount due must be sworn to, it would raise a question in every case how much was due.

Rule absolute.

The KING, in aid of *HOLLIS, v. BINGHAM*.

A Crown debtor, who has issued prerogative process against his own debtor, is not entitled to continue those proceedings after he has paid his debt to the Crown, and after the defendant has obtained the benefit of the Insolvent Act, and been thereby discharged from the debt due to the Crown debtor.

MANNING shewed cause against a rule calling upon *Hollis* to shew cause why the *scire facias* issued against the defendant should not be quashed, and why *Hollis* should not pay the costs occasioned thereby, and the costs of this rule.

The objection to the proceeding is, that *Hollis*, not being now indebted to the Crown, cannot avail himself of the process of extent issued against *Bingham*; but, if he was indebted to the Crown at the time of issuing the extent, that is sufficient. The extent in aid originally issued against *Bingham* in 1816. *Hollis*, who was distributor of stamps for the county of *Hants*, was a Crown debtor, being at that time liable to the Crown for *Bingham's* deficiencies.

Bingham has since taken the benefit of the Insolvent Debt

The bond is still outstanding. He cited *Attorney-General v. Stonehouse* (a), and *Rex v. Clarke* (b). In the latter case, the Court said that it should not be a rule that a debtor of the Crown (though the Crown debt was satisfied) should not have the benefit of the Crown process to reimburse himself, though it could not be granted under the circumstances of that case. They ask also, not only for the costs of this rule, but for all the costs, since *Hollis* ceased, as they say, to be a Crown debtor in 1825. But these costs cannot be claimed from us. *Rex v. Bingham* (c).

1833.
The KING in
aid of HOLLIS
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Follett in support of the rule.—This case has been several times before the Court, since the defendant was discharged under the Insolvent Act, in 1822. In 1831 it was decided, that *Hollis* was not entitled to use prerogative process: the case was then fully discussed (d), and now they sue out a *scire facias*. The defendant was fully discharged, as against *Hollis*, by the Insolvent Debtors' Act; what right can *Hollis* have now to proceed against *Bingham* by prerogative process? The Crown is no party to it, for *Hollis* is no longer a debtor to the Crown; and from our inquiries at the Stamp Office, it appears that *Hollis* has not been a distributor of stamps for many years, and that he is no longer a debtor to the Crown. In 1825, *Hollis* paid the amount due to the Crown, and though he was required to give a fresh security, against future liabilities, he does not thereby become a Crown debtor till he is called upon to pay something.

BAYLEY, B.—It seems to me, that this case is disposed of by the case in 2 *Crompton & Jervis*, 130. The Court there

(a) Hard. 229.

(b) Bunb. 221.

(c) 1 Cr. & J. 379.

(d) *R. v. Bingham*, 2 Cro. & J. 130.

1833.
 The KING in
 aid of HOLLIS
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expressed an opinion that *Hollis* could have no further proceeding against *Bingham*, either in his own name, or in the name of the Crown. In 1813, *Bingham* was indebted to *Hollis* in a sum of money. In 1817, an extent issued against *Hollis*, and an extent in aid by *Hollis* against *Bingham*. *Bingham* has since obtained his discharge under the Insolvent Debtors' Act. The consequence of that is, that *Hollis* has no right to call for payment of that debt, because it is at an end; but if circumstances occur, which, as between the original creditor and debtor, would be a bar, and the Crown has no longer any interest, are we to suffer the creditor to avail himself of Crown process, so as to defeat what would have been a complete answer as between themselves? But *Hollis* having once obtained prerogative process, he says the Crown is not barred, and, standing *in loco coronæ*, he is entitled to use that process. If *Hollis* is indebted to the Crown, the Crown is entitled to compel *Bingham* to pay; but we must be satisfied that he is indebted to the Crown, before we can allow him to avail himself of prerogative process, otherwise it is an abuse of the process of the Court. And I think it would be an improper exercise of the discretion of this Court, if we held that he could avail himself of the process of this Court, not for a debt due to the Crown, but for a debt

of 1830. The case in *Bunbury* has a note, that the *Attorney-General* said he would not be concluded. As far as *Hollis* is concerned, he can do nothing, but the Crown may perhaps now, if necessary, issue process against *Bingham*.

1833.
The King in
aid of *HOLLIS*,
v.
BINGHAM.

The other Barons concurred.

Rule absolute.

HUGHES, Administratrix, v. BRAND.

CHILTON applied to set aside an order of *Gaselee, J.*, under these circumstances:—The action was brought by the plaintiff as administratrix, for a debt of 6*l.* 6*s.* 2*d.* On *March* 6th, *Gaselee, J.*, on the application of the defendant, made an order, that on payment of the debt and costs in a week, all proceedings should be staid, and the Master was to consider whether the costs of the issue were to be allowed. On *March* 11th, the learned Judge made another order, that the plaintiff's agent should deliver to the defendant's attorney within a week, at the plaintiff's expense, a bill of costs, which was to be taxed; and that the defendant should have a week after the delivery of the bill to pay the debt and costs, and that the plaintiff should pay the costs of the application, to be deducted from the costs payable by the defendant; and that the plaintiff should not be allowed any costs after the 6th of *March*. Against this latter order the plaintiff protested, and *Chilton* now contended it could not be supported, as it had frequently been decided that a Judge had no power to order costs to be paid. In answer to a question from the Court why he had not applied last Term, it was said, that it was supposed that the defendant would abandon the order without expense, and pay the debt and costs, and that the delay was to the plaintiff's own prejudice. No bill of

Semble, that a Judge at Chambers has now a power to order costs to be paid by either party according to his discretion.


1833.
HUGHES
v.
BRAND.

costs had been delivered. The present application was made on the 6th of *June*.

The Court having expressed a decided opinion that the application was now too late, unless the delay was explained—

Chilton, on the following day, produced an affidavit of the illness of the plaintiff's attorney, which prevented his attending to business in *Easter Term*; and he now contended, that the order directing the plaintiff to pay the costs of the taxation and of the summons could not be supported, as a Judge at Chambers had no power to make such an order.

BAYLEY, B.—Since the Uniformity of Process Act, a Judge at Chambers is in a very different situation to what he was in before the act. A great deal of new business is now thrown upon him. The act certainly does not give such power to the Judge in express terms; but it seems to be impliedly given him in some cases; as, where the declaration is in vacation and irregular, cannot an application be made to a Judge to set aside the declaration with costs?



1833.

LEWIS v. PINE.

THIS was a rule for setting aside a *scire facias* for irregularity. One objection was, that it was served too late.

A *scire facias* served upon bail on the evening before the return-day:—
Held, regular.

Hutchinson shewed cause, and cited *Tidd's Practice* (a), that the bail may be served at any time on the return-day; for which he cited *Clarke v. Bradshaw* (b). It cannot be served after the rising of the Court on the return-day, but there is no other rule. Here the service was at a quarter past eight on the evening before the return-day.

Carrington, contra, contended, that the object of serving the bail was to give them an opportunity of rendering the principal; that this object might be defeated, if it was not served till it was too late for the bail to procure the principal in time; and, since the late rule (c), which has abolished the practice of taking proceedings against the bail behind their backs, compels the plaintiff to give them notice of the proceeding, the Court would be disposed to hold that the bail should have a reasonable time allowed them, as four days before the return. He referred to *Webb v. Harvey* (d), where a *scire facias* served only an hour before the rising of the Court, on the return-day, was held irregular; and also to *Dax's Practice*.

The Court, however, on the authority of the case of *Clarke v. Bradshaw*, held the proceedings to be regular.

Rule discharged, with costs.

(a) 9th ed., p. 1124.

(b) 1 East, 86.

(c) Reg. Gen. H. T. 2 Will. 4, s. 81.

(d) 2 T. R. 757.

1833.

CORTESSOS v. HUME.

The affidavit in support of a motion to set aside a judgment of *nonpros*, should state either that there is a good cause of action on the merits, or that there is a present cause of action.

A *NONPROS* having been signed in this action for want of a declaration in due time—

Hall obtained a rule *nisi*, to set it aside, on an affidavit, which stated, that the plaintiff had lent to the defendant 114*l.* in *February* last, for which the action was brought; and that, in consequence of a Colonel *Despard* having interfered and asked for time for the defendant, who was very ill, the plaintiff had delayed to declare. It was also sworn that the plaintiff had a good cause of action.

Archbold shewed cause, and produced an affidavit, denying that the plaintiff had lent any money to the defendant in *February* last, or that the defendant had ever authorized *Despard* to make any application to the plaintiff, and stating that there was a good defence to the action. He contended, that the ground of the application failed. He also objected to the affidavit on which the rule was moved, that it did not state that the plaintiff had a present cause of action, or that he had a good cause of

action on the merits. The rule ought, at all events, to

of costs; but *Archbold* stating that the bail were discharged, and that there ought therefore to be an *exoneretur* entered on the bail-piece, the Court said, that, on these terms, the rule would be absolute without costs.

1833.
CORTESOS
v.
HUME.

Rule absolute, without costs.

DAVIS v. COOPER.

THE defendant was served with the writ of summons in this action on the 20th of *May*. No appearance being entered, the plaintiff, on the 29th, entered an appearance for the defendant, delivered a declaration with notice to plead, and gave a rule to plead. On *June* 3rd, the defendant entered an appearance, and gave notice of it to the plaintiff: three days afterwards, the plaintiff signed judgment.

If the defendant neglects to enter his appearance to the writ within eight days, and the plaintiff enters an appearance for him, and then the defendant enters an appearance and gives notice of it, the plaintiff may proceed as if no such appearance had been entered, and may sign judgment without a demand of plea.

Archbold having obtained a rule *nisi* to set aside the judgment for irregularity, on the ground of there not having been any demand of plea—

Erle shewed cause, and cited *Free v. Mason* (a), where it was held, that a demand of plea is unnecessary, where the plaintiff appears for the defendant according to the statute.

Archbold in support of the rule.—In this Court, if the defendant appears, and the plaintiff knows of it, whether he had before appeared or not, the defendant is entitled to a demand of plea. The case cited is founded upon a

(a) 5 B. & C. 763.

1833.

DAVIS
v.
COOPER.

rule which does not apply to this Court; before that rule was made in the *King's Bench*, a party was bound to demand a plea. An appearance having been entered before judgment was signed, the plaintiff was bound to take notice of it.

LORD LYNDHURST, C. B.—There is a rule in the *King's Bench* (a), which was drawn up immediately after the passing of the act of 12 *Geo.* 1, c. 29, which specially directs, that where the plaintiff enters the appearance, and gives notice thereof to the defendant, and the defendant does not plead within the time given by the rule for pleading, the plaintiff may sign judgment without any further calling for a plea. There is a similar practice in the *Common Pleas*; and, in a case of doubt, this Court would follow the *King's Bench*.

BAYLEY, B.—After the plaintiff had appeared, the defendant's appearance could do no good. He should have done it in proper time. The effect of his being allowed to appear and give notice of it, would be to get twenty-four hours more time to plead, after he has had his eight days without having entered an appearance.

1833.

BENNETT v. THOMPSON.

HUTCHINSON had obtained a rule *nisi*, under the 11 Geo. 4 & 1 Will. 4, c. 73, s. 3 (a), for an extent to be issued against the defendant *Thompson*, the editor of the *Satirist* Newspaper, and his sureties in the bond and recognizance, given under the provisions of the statute 60 Geo. 3, c. 9. The plaintiff having brought an action against the defendant for a libel, and recovered 100*l.* damages, issued execution against the defendant's goods for 193*l.* The affidavit stated, that *nulla bona* had been returned to this writ, and that the defendant could not be found; and that no satisfaction could be obtained for the debt and costs. It also stated, that the sureties could not be found. The plaintiff prayed, that he might be at liberty to issue an extent against the defendant and his two sureties; and that service of the rule at the last place of abode, and at the Newspaper office, might be good service.

A plaintiff having recovered damages for a libel against the proprietor of a newspaper, is not entitled to an extent against the principal and sureties in the recognizance, given by them to secure the payment of penalties, under the 11 Geo. 4 & 1 Will. 4, c. 73, s. 3, merely by getting a return of *nulla bona* to a *fi. fa.* issued against the principal, but he must convince the Court, by affidavit, that every exertion has been made to obtain satisfaction from the defendant.

Erle shewed cause, and contended that the plaintiff was not entitled to the extent until he had used proper

(a) Which enacts, "That if any plaintiff, in any action for libel against any editor, conductor, or proprietor of such newspaper, pamphlet, or other paper as aforesaid, shall make it appear by affidavit to his Majesty's Court of *Exchequer*, that he is entitled to have execution against the defendant upon any judgment in such action, but that he has not been able to procure satisfaction by writ of execution against the goods and chattels of such defen-

dant, it shall be lawful for the said Court, for the benefit of such plaintiff, to order and direct such proceedings to be had and taken upon such recognizances or bonds respectively, as would be taken to obtain any fines or penalties due to his Majesty, secured by such recognizance and bond. Provided always, that the expense of such proceedings shall be exclusively borne by such persons as aforesaid."

1833.

BENNETT
v.
THOMPSON.

means to get satisfaction from the principal. The only endeavours made have been by issuing a writ of *fi. fa.*, and lodging it with the sheriff. The affidavits as to the state of the sureties are immaterial.

Hutchinson.—We swear that we have been unable to obtain satisfaction, that the defendant is insolvent and has no visible property, and that we are unable to get satisfaction.

Per Curiam.—Excepting that, you do not state any thing that you have done, or any steps that you have taken. You do not say you went to the defendant's house where he lived, nor whether you know of any other place where you might find some property to take; all that you do is to get *nulla bona* returned to the writ. You want the money without the trouble of getting it.

Rule discharged, without costs.

REGULA GENERALIS.

COURT OF EXCHEQUER CHAMBER.



KING'S BENCH PRACTICE COURT.

Easter Term,

IN THE THIRD YEAR OF THE REIGN OF WILL. IV.

CONNEL v. WATSON.

THESIGER shewed cause against a rule obtained by *Shce*, for giving the defendant his costs, under the 43 G. 3, c. 46, s. 3, on the ground of his having been held to bail for more than the amount recovered by the plaintiff, without reasonable or probable cause. The present action had originally been brought in the *Palace Court*, and removed thence into the Court of *King's Bench*. He contended, that the 43 Geo. 3, c. 46, s. 3, only enabled the Court in which the action was originally brought to grant costs to the defendant. Here, the action having been brought in the *Palace Court*, the *King's Bench* has no power over the costs. This was holden in the case of *Handley v. Levy* (a). A similar decision was pronounced by the *Common Pleas* in the case of *Costello v. Corlett* (b).

If a cause has been removed by *hab. corp.* into the *King's Bench* from the *Palace Court*, and the plaintiff recovers less than the sum for which the defendant was arrested, the former Court cannot grant the defendant his costs, under the 43 Geo. 3, c. 46, s. 3.

Shce supported the rule, and contended that the proceedings in the inferior Court having been removed by *habeas corpus* into this Court, the proceedings in the *King's Bench* must be considered as a new action; for the plaintiff

(a) 3 M. & R. 37; S. C. 8 B. & 315, S. C. See also the case of *James v. Dawson*, ante, vol. 1, C. 637. p. 341, which is to the same effect.
 (b) 4 Bing. 474, 1 M. & P.

1833.
CONNEL
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WATSON.

could declare for a new cause of action, and in a different form. It being a new action, the *King's Bench* must be considered as the Court in which the action was brought. The word "brought" must refer to the Court in which the costs have been incurred. The costs in the action were incurred in this Court, and therefore this Court must have authority to grant them to the defendant. It would be absurd to contend that the *Palace Court* had power to grant costs incurred in the *King's Bench*. Unless, therefore, this Court granted the defendant his costs, the object of the statute would be frustrated.

Cur. adv. vult.

PATTESON, J.—I have mentioned this case to the other Judges, and we are all of opinion that this Court has no power to grant the defendant his costs, under this statute. It is said, that this imposes great hardship on the defendant; but he is himself the cause of it, by removing the action into this Court. There would be a hardship on the defendant, if the plaintiff had power to remove the action into this Court. He has not, however, such a power, for this reason, that he has chosen the jurisdiction before which to bring his action.

only taken one surety. If the sheriff omitted to take two sureties, or permitted the defendant to go at large without taking a bail bond, and he afterward became liable to an attachment for not bringing in the body, he was not entitled to relief. He cited *Rex v. The Sheriff of London (a)*, in which case it was holden, that where a sheriff had taken a bail bond executed by only one surety, the Court would not set aside, even on payment of costs, an attachment which had issued against him for not bringing in the body.

1833.
 Rex
 v.
 The Sheriff of
 MIDDLESEX.

Steer, contra, contended, that the Court would not set aside an attachment in a case where the application was made by the sheriff himself; yet it was different where it was made at the instance of the bail, as in the present case.

PATTESON, J.—The bail who has been taken is liable on the bond; and, as this application is made at his instance, I think the present rule must be made absolute on payment of costs.

Rule absolute, on payment of costs.

(a) 9 Moore, 422; S. C. 2 Bing. 227.

LIVERSEDGE, Assignee of COOPER, v. GOODE.

W. H. WATSON moved for a rule *nisi* for setting aside proceedings in this action. *Cooper* the bankrupt, before his bankruptcy, and his assignees after that event, had been tenants to the defendant. Rent, which accrued after the bankruptcy, being in arrear, the defendant distrained on the goods of the assignees, which they replevied, but were ultimately *nonprossed* for not declaring in the county court. They paid the rent and costs in the

Where a plaintiff has been *nonprossed* in replevin, and he afterwards brings trespass for the same cause, the Court will not set aside the proceedings in the second action on motion.

1833.
LIVERSIDGE
v.
GOODE.

action, and the plaintiffs had the goods back. The plaintiffs then commenced the present action of trespass, for taking the same distress. The present proceedings must be taken to be vexatious, and if so, the Court had a right to interfere to set them aside.

PATTESON, J.— Might not these facts be pleaded?

W. H. Watson.—Probably they might; but it is the practice of the Courts, where two actions are brought for the same cause, although the defendant may plead the pendency of another action in abatement, not to drive him to his plea, but to relieve him summarily, on the ground that two actions for the same cause are vexatious. The judgment of *nonpros* in replevin is final, being either at the common law for a *retorno habendo*, or for the rent, under the statute of 17 Car. 2, c. 7, and is, therefore, a determination of the suit, and of the right of distraining; and, therefore, the Court will, under such circumstances, give the defendant relief on motion, as the question has been determined.

PATTESON, J.—The judgment of *nonpros* is not a judgment on the merits; and, therefore, I incline to think it is



1833.

GRIFFITHS v. LIVERSEDGE.

BAZETT shewed cause against a rule *nisi* for setting aside a judgment and execution for irregularity. The alleged irregularity consisted in the non-compliance with 12 Reg. Gen. T. T. 1 W. 4 (a), which requires, "that, before taxation of costs, one day's notice shall be given to the opposite party." Here, however, no taxation was necessary; and, consequently, no notice of taxation could be necessary. It was an action on a bill of exchange, and a *cognovit* was given by the defendant for the amount of debt and costs. The only costs for which judgment was signed, were those included in the *cognovit*, and the costs of signing judgment. The amount of the costs of signing judgment was a fixed sum, which could not be taxed. The amount of the other costs being ascertained in the *cognovit*, there was no necessity for taxing them.

Where, by the practice of the Courts, costs need not be taxed, it is unnecessary to give the notice required by 12 Reg. Gen. T. T. 1 W. 4.

Thomas was heard in support of the rule.

PATTESON, J.—The rule cannot apply to cases where no taxation is necessary. We have held, that, in the case of a warrant of attorney, it is not necessary to tax the costs of signing judgment, because they are a fixed sum, which cannot be reduced. In the case of a *cognovit*, where the amount of costs is mentioned in that instrument, it is not necessary to tax them. It would be different if the amount of the costs were not mentioned in it. But, here, the amount was mentioned, and there was nothing to tax. As there was nothing to tax, no notice of taxation could be necessary. The present rule, must, therefore, be discharged with costs.

Rule discharged, with costs.

(a) *Ante*, vol. 1, p. 105.

1833.

Where a verdict has been found, subject to a reference, and the award has not been made until some terms afterwards, judgment cannot be entered up as of the term next after the verdict, without a special application to the Court.

BROOKE and Another, Assignees of SMITH, v. FEARNs.

DODD shewed cause against a rule *nisi* for entering up judgment in the above cause, as of *Michaelmas* Term last. The cause was tried at the last Summer Assizes, and a verdict found for the plaintiff, subject to a reference. The arbitrator made his award on the 3rd *February* in the present year. The present rule was obtained on an affidavit, which stated that the defendant was about to leave the country. All the statements in that affidavit were completely answered. Now, an application of this sort could not be granted, unless there was some special ground shewn. The supposed special ground here having failed, the present rule must be discharged.

Wightman, contra, admitted that he was answered by the defendant's affidavits; but he contended that it was a matter of course for the plaintiff to be at liberty to enter up judgment as of the term next after the assizes at which the verdict was found, although the award might not be made until a subsequent period.

PATTESON, J. (after inquiring of the Master).—It is

1833.

THOMAS v. PHILBY.

FOLLETT applied to make a Judge's order of reference a rule of Court. The only difficulty which presented itself in doing so, was, that the arbitrator, who was not a barrister, had the original order of reference, and refused to deliver it up without payment of an exorbitant fee of a hundred guineas for four meetings.

Where, from the misconduct of the arbitrator, the original order of reference cannot be obtained, a duplicate may be made a rule of Court.

PATTESON, J.—Under these circumstances, you may obtain a duplicate of the order, and make that a rule of Court.

Rule accordingly.

ENGLEHEART v. EYRE and Another.

MANSEL moved to set aside a writ of summons, on the ground of various alleged defects in it. First, the summons stated, that, in case of the defendants' default in causing an appearance to be entered for them, the plaintiff "may cause an appearance to be entered for you." As there were a number of defendants, it ought to have stated, "for you, and each of you." The words, "for you," could only properly apply to the case of one defendant. Secondly, the provision of s. 12, of the 2 & 3 Will. 4, c. 39, was not complied with. That section required an indorsement, on all process, of "the name and place of abode of the attorney actually suing out the same." That of course must mean, the name and place of abode of the attorney on the record. But here the indorsement was of the name of the firm to which the attorney belonged: thus, "*Poole & Gamlen*." Thirdly, the residence stated was "*Gray's Inn, London*," although no part of *Gray's Inn* was in *London*. The object of the statute was, that the defendant

Where there are several defendants, the word "you" in the notice in a summons, that the plaintiff may enter an appearance for the defendants, if they do not appear, is to be construed distributively.

On a summons, the name of the attorney suing it out is sufficiently stated by indorsing the name of the firm to which he belongs.

The residence of an attorney is sufficiently described by the indorsement, "*Gray's Inn, London*."

1833.
ENGLEHEART
v.
EYRE.

might easily discover the residence of the attorney suing out the process, but that object would not be attained by such an indorsement, as no one could be adequately guided to the attorney's place of residence by so general a description.

Cur. adv. vult.

PATTESON, J.—In this case, I think the defendants ought not to have the rule prayed. As to the first objection, that the words in the summons ought to be “for you and each of you,” instead of “for you,” I think that the word “you” is to be taken distributively, as applying to each of the defendants; and, therefore, that it is sufficient. With respect to the second point, that the name of the firm is indorsed, instead of that of the attorney whose name appears upon the record, I think the indorsement is sufficient. The case of *James v. Swift (a)* is an authority in point; there, in an action for false imprisonment against a justice of the peace, the notice required by the 24 Geo. 2, c. 44, was signed “*T. & W. A. Williams.*” The names of the attornies for the plaintiff were, *Thomas Adams Williams*, and *William Adams Williams*. The Court there held the indorsement sufficient. Indeed, it is not only sufficient to state the name of the firm, but it appears to me

1833.

REX v. The Sheriff of MIDDLESEX, in CRAWFORD v. BOYD.

BALL obtained a rule *nisi* for setting aside an attachment against the sheriff, on the ground that the rule for bringing in the body was in the name of an attorney who had not appeared in the previous proceedings.

In all cases, the order for changing an attorney must be served on the opposite party.

Alexander shewed cause, and produced an affidavit which stated that an order for changing the attorney had been obtained, but was not served on the opposite party. He admitted, that, if the attorney had died, it would have been necessary to give notice of the appointment of a new attorney, as in the case of *Ryland v. Noakes* (a); but contended that such strictness was not necessary where the attorney was merely changed.

Ball, contra, was stopped by the Court.

PATTESON, J.—It is necessary, in all cases, that the order for changing the attorney should be served on the opposite party, otherwise there might appear to be several attorneys acting for the same party in the same cause, and his opponent would not know to whom he was to attend. It is more important that the order should be served in those cases where a change of attorney has taken place, than where an attorney has died; for, the death of the attorney might have been known to the party.

Rule absolute, with costs.

(a) 1 Taunt. 342.

1833.

Ex parte TIGHE.

The Court will not interfere under the 32 Geo. 2, c. 28, s. 11, to relieve a debtor from alleged extortion, unless a *prima facie* case of extortion is made out on the part of the petitioner.

ALEXANDER presented a petition under the 32 Geo. 2, c. 28, s. 11, on the part of a person named *Tighe*, who was confined in the custody of the Marshal, for relief from certain extortions to which he alleged himself to have been subjected by the officers of the *King's Bench* prison. His affidavit stated, that, between the years 1824 and 1827, he had obtained 211 day-rules; for each of these he had been charged 4*s.* 2*d.* fees. This, he stated, was a greater amount, "as he understood," than he ought to pay for each day-rule. He further stated, that he had complained to the Master of the Crown Office, and that, although that officer had inquired into the matter, no redress had been afforded him.

PATTESON, J.—As this is not a common application, I will consult the other Judges on the point.

Cur. adv. vult.

PATTESON, J.—I have spoken to the other Judges on

complained to the Master of the Crown Office, and that he has received no redress. Now, the Master of the Crown Office, it appears, has inquired into the matter, and he reports to us that the fees were perfectly legal, according to the practice as it existed between the years 1824 and 1827, although, from the alterations arising from paying the various officers by salaries instead of fees, the fees on a day-rule now only amount to 3*s.* 2*d.* instead of 4*s.* 2*d.* Under these circumstances, there is nothing like a *prima facie* case to authorize the interference of the Court, and therefore this petition cannot be received.

1833.
Ex parte
 TIDDE.

HOAD *et Ux.* v. MATTHEWS.

COMYN shewed cause against a rule for discharging the female plaintiff out of custody on a *ca. sa.* issued against her for the costs of a nonsuit in this action. It was an action of trespass for imprisoning the wife, and the plaintiffs were nonsuited. The question was, whether she was entitled to be discharged under these circumstances? *Mr. Tidd*, in his *Practice*, vol. 1, p. 194, ed. 9, laid it down, that, "in actions against husband and wife, the husband alone is liable to be arrested on *mesne* process, and shall not be discharged until he hath put in bail for himself and his wife. If the wife be arrested on *mesne* process, she shall be discharged on common bail, and that whether she be arrested singly or jointly with her husband. But, where the wife is taken in execution, she shall not be discharged, unless it appear that she has no separate property out of which the demand can be satisfied; or that there is fraud and collusion between the plaintiff and her husband to keep her in prison." It is, therefore, important to consider whether the wife has any separate property of her own. She swears that she has not; but the affidavits in

In an action of trespass by husband and wife, if a nonsuit takes place, the wife may be taken in execution for the costs, if she has separate property.

1833.
HOAD
v.
MATTHEWS.

answer suggest that she has one eighth part of certain leasehold property, and has a share in other property under a will. Whether she has separate property, therefore, is a matter of doubt. But the interference of the Court, even if there was no doubt upon the point, would be a matter of discretion in the Court, as was laid down in the case of *Chalk v. Deacon and wife (a)*. Under these circumstances, as it did not clearly appear that she had no separate property, the Court would not be disposed to discharge her out of custody.

Law, contra.—According to the language of Mr. *Tidd*, as there is no pretence for suggesting that any collusion exists on the part of the husband to keep his wife in prison, the only question is, whether she has separate property. Mr. Justice *Bayley*, in the case of *Sparkes v. Bell (b)*, recognised this as the correct rule. The defendant here swore that she had no separate property, and it was for the other side to shew that she had. This they had not done, and therefore the female plaintiff was entitled to her discharge.

Cur. adv. vult.

the judgment in both cases is against husband and wife. As it does not appear in this case that there is any reason for supposing the husband to collude with the defendant, for the purpose of keeping the wife in confinement, the case is reduced to the question, whether she has any separate property. She says she has no property in her own right, separate and apart from her husband. The answer to this is, that it is believed she has one eighth part of certain leasehold property, and that she has a share of certain other property under a will. It is thus left a matter of doubt. It would, therefore, be more satisfactory if she would produce the will. If the property is settled to her sole and separate use, she is not entitled to her discharge; but, if it was not left to her sole and separate use, I think she ought to be discharged. The burthen of shewing that the property is for her separate use, is thrown on the other side. The rule will, therefore, be absolute for discharging her, unless it is shewn within two days that the property is settled to her sole and separate use under the will.

Rule accordingly.

BRAGG *v.* HOPKINS, } *King's Bench.*
 WILLS *v.* HOPKINS, }
 WILLS *v.* HOPKINS, *Common Pleas.*

BARSTOW, for the sheriff of *Dorset*, moved for the usual rule under the interpleader act (1 & 2 Will. 4, c. 58, s. 6). He made it part of his motion, that the rule should include the execution creditors in the *Common Pleas*, so as to save the sheriff the expense of a separate application to that Court. He admitted that the practice was for the sheriff, where he had writs against the same defendant issuing out of several Courts, to apply separately to each Court; but he submitted that either Court might

1833.
 HOAD
 P.
 MATTHEWS.

One Court cannot relieve the sheriff under the interpleader act with respect to process issued out of another Court.

1833.
 ———
 BRAGG
 v.
 HOPKINS.

entertain the subject matter of the different claims: and that, when that Court was possessed of it, the judgment creditors under the other writs might be called before the Court as persons laying claim to the goods, according to the words of the act.

PATTESON, J.—It certainly is a point of considerable importance to sheriffs; but I do not think they can be relieved in the way you suggest.

I know my Brother PARKE last term had, on one occasion, to consider whether the act applied to cases of conflicting executions. He thought it did not. You must take your rule only in the *King's Bench* causes, and must apply by a separate motion to the *Common Pleas* in the cause in that Court.

Rule *nisi* accordingly.

—◆—
 SMEDLEY v. CHRISTIE and Another.

Where a defendant is entitled to judgment as in case of a nonsuit, for not giving notice of

MANSEL shewed cause against a rule for judgment as in case of a nonsuit. In this case, issue was joined in *Michaelmas* Term, 1832. No proceedings were taken by the plaintiff during that Term or *Hilary* Term. On the

dant did not move for judgment as in case of a nonsuit until after fresh notice of trial, the defendant was still entitled to his judgment.

1833.
 SMEDLEY
 v.
 CHRISTIE

PATTESON, J.—In this case, no default has been actually made except in not giving any notice of trial. But, in the case of *Bainbridge v. Purvis*, there had been an actual notice of trial, although the record was withdrawn.

White.—The plaintiff has neglected to proceed according to the course and practice of the Court, by not giving notice of trial. The case therefore comes within the mischief contemplated by that of *Bainbridge v. Purvis*. The defendant will be thrown over the term in consequence of the plaintiff's *laches*.

PATTESON, J.—I think this case comes within the principle of *Bainbridge v. Purvis*. The rule must, therefore, be absolute, unless the plaintiff will give a peremptory undertaking to try pursuant to his notice.

Rule discharged accordingly.

GILBERT v. KIRKLAND.

N. R. CLARKE shewed cause against a rule for judgment as in case of a nonsuit. Notice of trial was given for the last *Summer* Assizes, when it was made a *remanet*. Another notice was given for the *Spring* Assizes, at which time the plaintiff did not try. Having once taken down the cause to the assizes, and it having been made a *remanet*, the plaintiff had complied with the provisions of the act of

Where a plaintiff has once taken his cause down to the assizes, and it has been made a *remanet*, the defendant cannot obtain judgment as in case of a nonsuit, although the plaintiff may

have given a subsequent notice of trial, on which he has taken no steps.

1833.
 GILBERT
 v.
 KIRKLAND.

parliament, and therefore the defendant was not in a situation to move for judgment as in case of a nonsuit. He cited *Mcwburn v. Langley* (a), *Denman v. Bull* (b), and *Brown v. Rudd* (c).

White, contra, contended, that, although taking the cause down to trial, and making it a *remanet*, would cure previous *laches*; yet the plaintiff having taken down the cause a second time, and not having proceeded to trial pursuant to his notice, he was liable to judgment as in case of a nonsuit. The present case was distinguishable in this particular from any of the cases cited. He referred to the case of *Gadd v. Bennet* (d); in which case, the cause was set down for the sittings in term, and made a *remanet* to the sittings after term, by consent, and the Court there held that the defendant might move for judgment as in case of a nonsuit, if the plaintiff afterwards withdrew the record.

Cur. adv. vult.

PATTERSON, J.—I have consulted the other Judges on this point, and, looking at the principle of the authorities, we are of opinion that the plaintiff having taken down his cause to trial, and it having been made a *remanet*, the de-

1833.

HANWELL v. MURE.

A RULE was obtained to shew cause why the sum paid into Court by the defendant in lieu of bail, under the 7 & 8 Geo. 4, c. 71, should not be paid out to the defendant, he having put in and perfected special bail. The application was made after issue joined in the cause and notice of trial given, but before costs were taxed and final judgment signed. The rule being drawn up to shew cause in chambers.

Where money is paid into Court under the 7 & 8 Geo. 4, c. 71, in lieu of bail, and issue is joined, applications to take it out must be made before issue joined.

Dodd attended to support it, and contended that, as the words of the clause are, "it shall be lawful for the defendant, at any time in the progress of the cause, before issue joined in law or fact, or *final or interlocutory judgment signed*, to receive the same out of Court," the application was in time.

TAUNTON, J. (having retired to consult some of the other Judges, and having consulted six,) decided, that the application must be made before issue joined, in cases where issue was joined at all; and that the words, "before final or interlocutory judgment signed," applied only to cases of judgment by default, or on confession.

Rule discharged (a).

(a) See *Ferrall v. Alexander and Isaacson*, ante, Vol. 1, p. 132.

1833.

In re THORNTON, Gent.

The Court can only interfere to compel an attorney to deliver up deeds in his possession, at the instance of the party who deposited them with him.

HOGGINS obtained a rule calling on an attorney to deliver up certain title deeds of an estate in *Yorkshire*, on an affidavit stating that the party on whose behalf he applied had obtained a verdict in an action of ejectment, and had recovered possession of the estate; and that he had demanded the deeds of the attorney.

Dodd now shewed cause, on an affidavit stating that *Mr. Thornton* had received the deeds from a devisee under the will of a *Mrs. Williamson*, and given an undertaking for them to such devisee; that a second will had been found, and that the devisee under the second will was disputing the validity of the first in the Ecclesiastical Court of *York*; that the suit was now depending; that either of the devisees who succeeded intended to dispute the title of the party who had recovered in ejectment; and that *Mr. Thornton* had received notice from the devisee to retain the deeds. *Dodd* contended, that, as the application was not made either by the party who delivered the deeds to *Mr. Thornton*, or any party appearing to claim un-

1833.

GARRICK *v.* JONES and Others.
 JONES and Others *v.* GARRICK.

THIS was an application to set off debt and costs recovered in one action against debt and costs recovered in another. The former action had been brought by the captain of a vessel against his owners, and in it he recovered a sum of 114*l.* 8*s.* for debt and costs. For this, judgment was signed, execution issued, the amount levied, and in the hands of the sheriff, with notice to him to retain it. The second action, which was in the *Exchequer*, was brought by the owners of the vessel against the captain. A verdict had passed in favour of the plaintiffs for 143*l.* 15*s.* 4*d.*, but a rule for a new trial was still pending before the Court. Under these circumstances a rule *nisi* was obtained for setting off the amount of the sum for which the verdict was found against the amount for which the judgment had been signed.

The amount of a verdict recovered cannot be set off against the amount of a judgment.

Thesiger shewed cause against this rule, and contended that no such set-off as that prayed could be made. The owners had in fact obtained no available verdict, still less had they obtained any judgment. If, therefore, the present rule were made absolute, the captain would be deprived of the fruits of his judgment, without any corresponding advantage.

Alexander supported the rule.

PATTESON, J.—As the owners have obtained no final judgment, the present application cannot be granted. I think the rule ought to be discharged, with costs.

Rule discharged, with costs.

1833.

BRIGGS v. GILMOUR RICHARDSON.

Proceedings against bail are irregular, if the defendant has procured the *ca. sa.* against the principal to be returned *non est inventus*, knowing that the defendant is in custody of the sheriff, although by a different name.

MANSEL obtained a rule *nisi* in this case, to set aside proceedings against the bail, on the ground of irregularity. The plaintiff lodged a *ca. sa.* against the principal, and got it returned, "*non est inventus*." He then proceeded by *sci. fa.*, and ultimately fixed the bail. It appeared that the defendant had been arrested at the suit of other creditors, and committed to the custody of the sheriff of *Middlesex*, on the 20th November, 1830, and had remained in custody until July, 1831. He was detained in one action by the name of *H. G. Richardson*; in a second by that of *Henry Richardson*; in a third by that of *Henry Gilmour Richardson*. This third name was his real one. The *ca. sa.* was lodged in May, 1831, at which time the defendant was in the sheriff's custody. The return, however, had been "*non est inventus*." It was contended, that, as the defendant was detained in the actual custody of the sheriff, he could not properly return *non est inventus*, so as to warrant the proceedings against the bail (*a*), and therefore that the proceedings were irregular.

Hutchinson showed cause against the rule, and submit-

PATTESON, J.—It appears to me that the question here is, whether the plaintiff was aware that the defendant was in custody of the sheriff at the time he procured the *ca. sa.* to be returned *non est inventus*. If that fact were within his knowledge, it is immaterial by what name the defendant was detained, as he ought not to have procured such a return to be made. The Master will therefore inquire whether the plaintiff knew the defendant was in custody at the time he procured the return of *non est inventus*. If he finds that the plaintiff was aware of the fact, the rule must be made absolute; if not, it must be discharged.

1833.
BRIGGS
v.
RICHARDSON.

Rule accordingly.

The Master being of opinion that the plaintiff was not aware of the defendant's detainer at the time he procured the return of *non est inventus*, the rule was afterwards—

Discharged, with costs.

JONES's Bail.

MANSEL opposed country bail, on the ground that sufficient notice of justification had not been given. The bail-piece had been filed on the 6th of May, and notice of justification given on the same day for the 8th. It was contended, that, according to 1 Reg. Gen. T. T. 1 W. 4, (a) there ought to have been four days' notice of justification.

1 Reg. Gen. T. T. 1 W. 4, as to giving four days' notice of justification, only applies where the bail justify at the time of putting in.

PATTESON, J.—That rule only applies to cases where the bail are put in and justify at the same time. Here the bail were only put in on the 6th, and were not to justify till to-day.

Bail justified.

(a) *Ante*, Vol. 1, p. 102.

1833.


WELLS v. BARTON.

If a plaintiff, after leaving this country, commences an action, he will be compelled to find security for costs.

HUTCHINSON shewed cause against a rule requiring the plaintiff to give security for costs. The plaintiff had left *England* for *America* in *February*, 1832, and the present action was commenced in *April*, 1833. Affidavits were produced, in which it was sworn that the plaintiff was only temporarily absent, and that he meant to return shortly. No ground, therefore, was laid for compelling plaintiff to give the required security for costs.

PATTESON, J.—The cases in which a plaintiff is excused from giving security for costs on the ground of temporary absence from *England*, are those in which he has left this country after the commencement of the action. Here, the action was brought more than a year after the plaintiff had left *England*. The present rule must therefore be made absolute.

Rule absolute.

TAUNTON, J.—He may be re-admitted without paying any fine or the arrears of duty which have accrued since he took out a certificate, as it appears by the affidavit that he has not practised during that period.

1833.

Ex parte
THOMPSON.

Rule granted.

Ex parte JONES.

GEORGE applied on behalf of the plaintiff for a rule to shew cause why Messrs. *Adlington, Gregory, & Faulkner*, the agents of the plaintiff's attorney, should not pay over to the plaintiff the costs of a *nonpros* alleged to have been caused by the neglect of the agents.

If the agent of an attorney does wrong, the client cannot make a summary application against the agent.

TAUNTON, J.—There was no privity between the plaintiff and his attorney's agents, and therefore the Court cannot interfere. Granting that the agent is ever so wrong, there is no privity between him and the client. The plaintiff's remedy is against the attorney in the country. It is the duty of the attorney in the country to employ a proper agent. The present application cannot therefore be granted.

Rule refused.

Re BATEMAN.

PETERSDORFF shewed cause against a rule calling on Mr. *Bateman*, an attorney, to pay over the sum of 25*l.* to the plaintiff, pursuant to his undertaking. It appeared that an action had been commenced by a person named *Stratford* against a person named *Ayrton*. Mr. *Bateman*, who was an attorney, but not the attorney in the cause, gave his undertaking to the plaintiff for the payment of the sum of 25*l.*, in order to induce the latter to give time

The undertaking of an attorney cannot be summarily, unless he is acting as attorney in the cause.

1833.
Re BATEMAN.

to the defendant. The present application was, that the undertaking so given should be summarily enforced. It was contended that the Court had no power to interfere, unless the attorney against whom the application was made was the attorney in the cause. The mere fact of his being an attorney was not sufficient to entitle the Court to enforce this undertaking. The party to whom the undertaking was given must be left to his action. He cited *Ex parte Watts* (a), *Walkerv. Arlett* (b), *In re Paterson* (c), *In re Greaves* (d), and *Bursell v. Jones* (e).

PATTESON, J.—The Court cannot enforce this undertaking, unless the attorney is attorney in the cause.

Rule discharged, with costs.

(a) *Ante*, Vol. 1, p. 512.

(d) 1 C. & J. 374, n.

(b) *Ante*, Vol. 1, p. 61.

(e) 3 B. & Ald. 47.

(c) *Ante*, Vol. 1, p. 468.

—◆—
TRING v. GOODING.

TAUNTON, J.—You may enter an appearance for the defendant under these circumstances.

1833.
TRINITY
v.
GOODING.

Rule absolute in the first instance.

HEALD, Gent., one &c., v. HALL.

MARTIN obtained a rule *nisi* for reviewing the Master's taxation under these circumstances. The plaintiff, who is an attorney, brought an action at the instance of the defendant against a person named *Cosserat* upon a bill of exchange. A *cognovit* for the payment of the money on the first day of *Hilary* Term, 1832, was given. On that day, the money not being paid, the plaintiff wrote to *Cosserat*, requesting him to remit the amount. On the following morning, he received a letter from *Cosserat*, stating that he had tendered the money to *Hall* on the day it was payable. The plaintiff waited five days, and then signed judgment. An application was made by *Cosserat* to set aside that judgment, and the rule for that purpose was made absolute, with costs. Those costs were paid by the plaintiff to *Cosserat's* attorney. The present action was brought to recover the costs of signing judgment, and the costs paid by the plaintiff to *Cosserat*. The common order for taxation being taken out, the Master disallowed the costs of signing judgment and the sum paid by the plaintiff to *Cosserat*, as he was of opinion that, as the signing judgment was unnecessary, the costs of it, and all consequent costs, should be disallowed. It was contended that the Master had no power to disallow these costs; because, by doing so, he was entering into the question as to whether the labour of the attorney was or was not beneficial to the client, which question could only be tried before a jury.

Although the Master, on taxation, has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary.

1833.

HEALD
v.
HALL.

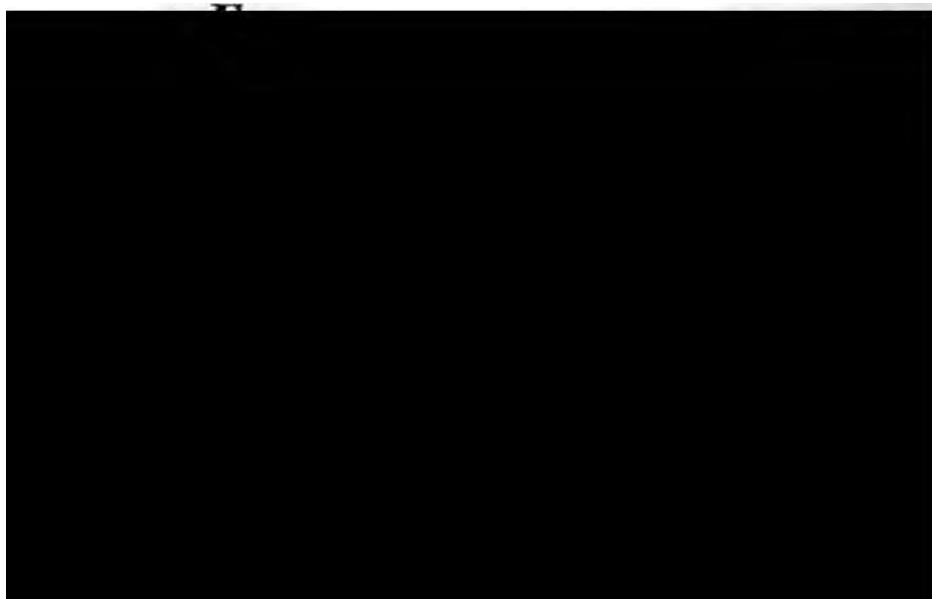
After cause had been shewn against this rule by
Jeremy—

PATTESON, J.—The plaintiff certainly has a right to have the question as to the costs paid to *Cosserat* tried by a jury; but I think that the Master had a right to disallow the other items. I do not think the Master has a right to inquire generally as to whether the proceedings taken have been beneficial to the client; but, in this particular case, the tender of the money to the client having been made with the knowledge of the plaintiff before he signed judgment, I think the Master might consider the signing of the judgment an unnecessary act, upon which he has a right to adjudicate. Upon the whole, however, as the sum paid to *Cosserat* only amounted to 4*l.*, the rule had better be discharged, without costs.

Rule discharged, without costs.



HARRINGTON v. PAGE.



J. J. Williams, contra, cited the case of *Tagg v. Madan (a)*, in which the Court intimated, that, if it could be seen from the record that the plaintiff was an attorney, he would be entitled to his privilege. The present action was for work and labour done by the plaintiff as an attorney. The Court could therefore see from the record that he sued as an attorney. Besides, it would be extremely hard if he were not allowed to avail himself of this privilege, since at the trial he would be obliged to shew that a signed bill had been delivered a month before the action brought, and that he was an attorney. If he were to be subjected to the difficulties attendant on his character of attorney, surely he ought to be allowed to enjoy the privileges connected with it.

1833.
HARRINGTON
v.
PAGE.

TAUNTON, J.—It is very clear, in point of practice, that the defendant in an action for work and labour done may move to change the venue from the county in which the action is originally brought, on the usual affidavit that the cause of action arose in another county, and not elsewhere. It is equally clear, that the plaintiff may bring back the venue in many instances, and one of those is where the plaintiff sues as a privileged person. The question here is, whether the person has discarded his character of a privileged person, and sues as a common person? By employing another attorney to bring the action, he has waived his privilege, and sues here as a common person; and it does not necessarily follow that he is suing for work and labour done in his character of an attorney, because, being an attorney, he brings an action for work and labour done by him. He is therefore not entitled to bring back the venue.

Rule discharged, costs to be costs in the cause.

(a) 1 B. & P. 629. See also *Strange*, 837; and *Welland v. Fau-*
Hetherington, one &c., v. *Louth*, 2 *ment*, Barnes, 479, ed. 3.

1833.

BISHOP v. HINXMAN.

Before the sheriff applies to the Court under the interpleader act, he is bound to inquire into the nature of the claims set up; and therefore, if he brings parties before the Court in consequence of a claim which is clearly bad in point of law, the Court will compel him to pay the costs.

RISING obtained an interpleading rule under the 1 & 2 Will. 4, c. 58, s. 6, on behalf of the sheriff of *Hampshire*, requiring the execution creditor in the above cause, and the mortgagees of certain property belonging to the defendant, to appear and state their claims, and abide such order as the Court should think it right to make. It appeared that a *fi. fa.* at the suit of the plaintiff had been directed to the sheriff, and he had made out his warrant to his officer for the purpose of seizing the goods of the defendant. On going to the premises, which were a farm, he found a man named *John Woodnut* in possession, who said, "that he had taken possession of the farm on behalf of the mortgagees of the property," but that he had no orders with regard to the growing crops, and that he would not interfere with any one who might claim them. A notice was afterwards given to the sheriff by the mortgagee, that he had taken possession of the growing crops, as well as of the farm. The execution creditor did not interfere either by abandoning his *fi. fa.*, or by acknowledging the claim of the mortgagees. Under these circumstances, the sheriff

obtained the above rule.

gees, having taken possession under their title, had taken possession of the growing crops as well as of the farm. There could be no valid or legal claim to any of the property on behalf of the execution creditor, and therefore the case did not come within the statute. The mortgagees having, then, been put to the expense of coming to answer the sheriff's rule, without any pretence for such a proceeding, the sheriff ought to pay the costs.

1833.
BISHOP
v.
HINXMAN.

Rising urged that the sheriff, being ignorant of the mortgage under which possession had been taken only two days before the receipt of the *fi. fa.*, and being told by *Woodnut*, the mortgagees' agent, that he did not claim the growing crops, was placed in difficulty by the mortgagees afterwards claiming those crops as well as the land; and that the mortgagees should therefore pay the costs, not the sheriff, who was never under the statute of interpleader allowed costs.

TAUNTON, J.—I am of opinion that applications under this statute ought not to be considered as a matter of course. It is the duty of the sheriff to make some inquiry before he comes to this Court. He is not to be spared all trouble, and to abstain from making all inquiry. But, where conflicting claims are advanced, on which he cannot decide, he may then come to the Court. It appears here, that, in point of fact, there were no conflicting claims. The question therefore is, who is to pay the costs. If the sheriff had no fair grounds for coming here, I think he ought to pay the costs? It appears, that, on the 8th *May*, the mortgagees took possession of every thing, and put a man into possession. In point of law, it is quite clear, that, if mortgagees take possession, the growing crops cannot be taken at the instance of an execution creditor pursuing the debtor to judgment. When the sheriff entered, these growing crops were not liable to the execution.

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BISHOP
v.
HINXMAN.

But it appears that the man in possession, *John Woodnut*, told the officer that he had taken possession of the goods and of the farm as the servant of the mortgagees, but that he had not the care of the growing crops, and that he would not interfere with any person who might claim them. Now, I think the sheriff should have known that the mortgagees, having taken possession of the lands, had *prima facie* taken possession of the crops. These crops were therefore protected from execution; and, although *John Woodnut* did say that they were not, he might have inquired whether that statement was true or not. But it appears that, before this rule was moved for, the sheriff received notice from the mortgagees that they had taken possession of the growing crops, as well as of the farm. Now, that formal notice was more than equivalent to the idle statement of *Woodnut*; but, instead of relying on the claim of the mortgagees, he took the idle declaration of this labourer. The judgment creditor did not object to the seizure of the mortgagees, and therefore there were no conflicting claims within the meaning of this act. If the judgment creditor had preferred a claim to the sheriff, and desired him to take possession of the growing crops, the case would have been different. Now, as the sheriff

1833.

CASSELDINE v. MUNDAY, (*in error*).

W. H. WATSON obtained a rule *nisi* in this case, calling on the defendant in error, and Mr. *Tindal*, the late under-sheriff of *Buckinghamshire*, to shew cause why the defendant or his attorney should not enter an award of an *elegit* and the sheriff's return to it on the roll, and why the under-sheriff should not deliver a copy of the *elegit* and the inquisition to the plaintiff in error. His affidavit stated that the defendant in error, *Munday*, obtained judgment in *Easter Term*, 1827, against the plaintiff in error, *Casseldine*. A *fi. fa.* was afterwards issued, and, the judgment not being satisfied, an *elegit* was issued in further satisfaction of it, and a moiety of the lands of the plaintiff in error taken under it. A writ of error was afterwards brought by the defendant below, and judgment was given in his favour, reversing the former judgment. He contended that as a *sci. fa.* was necessary to obtain restitution, a return to the *elegit* was also necessary. The office of the *custos brevium* was searched, and it appeared that the *elegit* had not been returned. The object of the application therefore was, that those steps might be taken which would enable Mr. *Casseldine* to obtain restitution.

Where a plaintiff has issued an *elegit*, and has not entered on the roll the award of *elegit* and the sheriff's return, and the judgment is afterwards reversed, the Court will compel the plaintiff to supply his omission, at the instance of the defendant.


N. Clarke shewed cause against the rule, on behalf of the defendant in error, on the affidavit of Mr. *Simpson*, his general attorney, although not the attorney in the cause. He contended, that, as the proceedings in error were hostile to his client, he was not bound to assist the plaintiff in error; and Mr. *Simpson*, now the attorney for Mr. *Munday*, swore that neither one nor the other had the *elegit* or return, and whether the former attorney had it or not he did not know. It was therefore impossible for the defendant in error to comply with the rule, if even it were made absolute against him.

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v.
MUNDAY.

Kelly shewed cause on the part of Mr. *Tindal*, the under-sheriff. At the time the *elegit* issued in the year 1828, Mr. *Tindal* was under-sheriff to Mr. *Harvey*, the then sheriff of *Buckinghamshire*. That gentleman ceased to be sheriff in 1829. Mr. *Tindal* was now under-sheriff again, under the present sheriff. He contended that the Court had no jurisdiction over the under-sheriff, he being only the servant of the sheriff. If any thing wrong had been done while Mr. *Harvey* was sheriff, the proper remedy was by action against him. However, it was sworn that the *elegit* and return, with the proceedings, had been delivered to the agent of Mr. *Munday's* attorney at that time.

W. H. Watson admitted that he could not support his rule against the under-sheriff.

TAUNTON, J.—The plaintiff in error is entitled to restitution of what was taken under process issuing on an erroneous judgment. He is therefore entitled to have all that done, *ex debito justitiæ*, which is necessary for the purpose of doing him justice, that is to say, to have the writ of *elegit* returned, in order that he may be relieved from the consequences of the erroneous judgment. My



TAUNTON, J.—Have you any affidavit to shew that the defendant in error has the *elegit* and return?

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CASSELDINE
v.
MUNDAY.

W. H. Watson.—No; it is sworn that the plaintiff in error does not know where it is; therefore the late under-sheriff was made a party to the rule. Mr. *Tindal*, by his affidavits, states that the writ was given to the plaintiff's attorney's agent for the purpose of returning it. Mr. *Yates* was the attorney of the defendant in error at that time, and his possession must therefore be considered as the possession of Mr. *Munday*; and he does not swear that such attorney has not got it.

Clarke objected that those affidavits of Mr. *Tindal* could not be used by the plaintiff in error in support of his rule; particularly as the defendant had no opportunity of answering them.

W. H. Watson.—Laying aside those affidavits, it must be presumed that the *elegit* with the return made is in the hands of Mr. *Munday*; for, he holds these lands as tenant by *elegit*. It is clear that a tenant by *elegit* has no title without a return—*Com. Dig. Execution, Bac. Abr. Execution*; and those authorities shew that an *elegit* differs from all other writs of execution; for, an execution as against lands is not good without a return; and therefore, as Mr. *Munday* has not answered what is the legal presumption, the rule should be made absolute.

TAUNTON, J.—I am of opinion, that the rule should be made absolute against the defendant in error, in the terms in which it is prayed. It is not necessary to say a word about the under-sheriff, Mr. *Tindal*. It does not appear that there is any particular evidence of the return to the *elegit* having come into the personal possession of Mr. *Munday*. But, he being tenant by *elegit*, he must

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be presumed to have every requisite muniment of his title either in his custody or under his control, so that he should be able to cause that to be done which is required by the present rule. It is no answer that Mr. *Munday* is very ill, and that Mr. *Simpson* is not the attorney who was employed in the cause. It should appear that Mr. *Munday* has no control over these papers. That, however, does not appear; and therefore I think that the rule should be made absolute against him, but discharged with costs as to Mr. *Tindal*.

Rule accordingly, the plaintiff in error paying the costs of filing the return.



Ex parte HERBERT.

Severe illness, under certain circumstances, will be considered as an excuse for not complying with the rule of Court, in putting

GODSON moved to admit an attorney, under these peculiar circumstances. He had put up the five notices at the chambers of the Judges of this Court, previous to the term, according to the rule of Court (*a*), but had been prevented by severe illness from putting up the notice outside the Court of *King's Bench*, and in the *King's Bench* office.

for not complying with all the requisites of the rule of Court.
Let him therefore be admitted.

Rule granted.

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Ex parte
HERBERT.

WIMALL v. COOK and Another, Bail of Cook.

PETERSDORFF applied to be permitted to sign judgment on a *sci. fa.* against bail. The affidavit on which he moved stated regular proceedings on the *sci. fa.*, which had been returned "*nihil*," but it omitted to state that any notice had been given to the defendants of the proceedings against them, or that any attempt had been made to give them such a notice. The bail resided in *Worcestershire*.

Judgment cannot be signed on a *sci. fa.* against bail resident out of the county of *Middlesex*, unless they have received notice of the proceedings, or attempts have been made to give such a notice.

PATTESON, J.—As it appears that the bail are resident out of the county of *Middlesex*, it is necessary either that they should have notice of the proceedings, or that an attempt should be made to give such notice to the bail by sending a letter to them, or by some other means. That was the intention of 1 Reg. Gen. H. T. 2 W. 4, s. 81 (a); I cannot therefore grant your rule.

Rule refused.

(a) See *ante*, Vol. 1, p. 194; *Higgins v. Wilkes*, *ante*, Vol. 1, p. 447.

REX v. MELLOR.

GREAVES obtained a rule *nisi* why a *habeas corpus* should not issue to remove *Samuel Mellor*, a prisoner in the county gaol of *Stafford*, on a commitment under 1 & 2

In a conviction for a trespass in the day-time under the 1 & 2 W. 4, c. 32, s. 30, the Game Act, the words

"enter and be" constitute only one offence.


In a conviction under the same section of the same act, the place of committing the trespass may be described as "certain land," without giving it a name, or setting it out with abutments.

As, by section 45 of that act, the conviction itself cannot be removed out of the inferior court, a verified copy may be used, to ascertain whether the conviction is valid.

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REX
v.
MELLOR.

W. 4, c. 32, s. 30 (a), for an alleged trespass in pursuit of game, into this Court, in order that he might be discharged, on the ground of certain defects in the commitment and conviction. The commitment stated that the defendant "did, on the 7th day of *February*, in the year of our Lord, 1833, at the parish of *Stoke-upon-Trent*, in the said county, *unlawfully commit a trespass by entering and being, in the day-time* of the same day, upon a common piece of land called *Witley Moor*, lying within the manor of *Buckwall*, in the said county, in the possession or occupation of *Daniel Bird Baddeley* there, in search of game." The conviction stated that the defendant "did, on the 7th day of *February* last past, *unlawfully enter in the day-time*, upon certain lands in the parish of *Stoke-upon-Trent*, in the county aforesaid, in the possession and occupation of *Daniel Bird Baddeley*, and there unlawfully was in the day-time, upon the said land there, in pursuit of game, and did then and there, by so entering and being on the said land aforesaid, commit a trespass in search of game."

On moving for the rule, he produced affidavits verifying a copy of the commitment, and also a copy of the conviction, which had been given by the clerk of the Justice of the Peace to the attorney of *Mellor*, in the presence and by the direction of the Justice of the Peace. The



given to the lord by s. 10 of the act—*secondly*, assuming that that defect could be cured by a valid conviction, that the conviction in this case was for a separate and distinct offence, and therefore did not support the commitment.

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REX
v.
MELLOR.

Shutt, on behalf of the magistrate, was proceeding to shew cause, when—

Platt, on behalf of *Baddeley*, submitted, that, under s. 45, the conviction could not in any way, or for any purpose, be brought within the cognizance of the Court; whereon—

TAUNTON, J., called upon—

Greaves to support his rule.—He contended, that the only object of that section was to prevent the conviction itself from being removed and quashed for any defects contained in it. Here that was not sought to be done. All that was attempted was, to give evidence of what the conviction really was, in order to ascertain whether it justified the commitment. It was clear from the very words of the section, that the legislature contemplated that evidence of the conviction might be given, otherwise it was impossible that it should appear that there was “a good and valid conviction” to support a commitment. If no evidence was admissible of what the conviction was, wherever the commitment was bad on the face of it, a party would be entitled to be discharged, although there might be a valid conviction duly made to support the commitment. So, on the other hand, if the commitment on the face of it were valid, although there were no conviction at all, or one manifestly illegal, the party would be compelled to lie in prison without the power of getting discharged.

TAUNTON, J.—I think we can, under the circumstances, look at the conviction.

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MELLOR.

Greaves.—The first objection to the conviction, and it is equally applicable to the commitment, is, that it charges the defendant with two distinct and separate offences, namely, “entering” and “being” on land, but only convicts him of one offence. “Entering” is one offence, “being” on land is another offence. In every case in the same section, where the disjunctive “or” is used, a distinction is clearly marked.

TAUNTON, J.—How can a man enter upon land, without being upon it?

Greaves.—That may be so. But a man may enter a close without any intention, at the time he enters, to pursue game, and such intention may *afterwards* come upon him. An “entry,” therefore, in pursuit of game, and “being in” a close in pursuit of game, are not necessarily the same thing.

TAUNTON, J.—I am of opinion that the words “enter or be” constitute but one offence.

Greaves.—Then the conviction is bad, as being too general in its terms. The description of the offence ought



if any person shall rob an orchard, not being felony by the laws of this realm, he shall be liable to be convicted, &c., stated that "*M. Chapman* did rob the orchard of *J. Whitby*." The robbery not being felony by the laws of this realm, the conviction was quashed; and by ryder C, it is laid down in 3 *Inst.* 41, that, although the words of a statute by which an offence is described, are general, the description of an offence in an indictment must be particular; for, that otherwise, the party indicted will not know what charge he is to defend himself against. The description of an offence in a conviction ought to be quite as particular, or perhaps more so, than in an indictment, because a conviction is a summary proceeding. These words in the present conviction are not a sufficiently particular description of the offence (*a*). The same law is laid down 1 *Chitt. C. L.* 275, and the cases of false tokens and false pretences referred to, where it has been held, that the false pretence or token made use of must be minutely described in the indictment. So here, the place ought to have been described with such particularity, as to enable the Court to see that a trespass might be committed upon it within the meaning of the act. In *Rex v. Chalkley* (*b*), it was held, that, although the 9 *Geo.* 1, c. 22, only mentions "cattle," yet it is necessary to specify the particular animal wounded. So here, the particular land trespassed upon ought to be specified. But this case is still stronger, for section 30 itself points out the distinction between commons and wastes, and other land; and therefore it falls within the reason of those cases, where it has been held, that if the statute makes a distinction between things belonging to the same class, or commonly comprehended within one general term, it is essentially necessary to indicate the par-

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 REX
 v.
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(*a*) *Rex v. Chapman*, Sayer, 203. This case was recognised and acted upon in *Rex v. Jarvis*, 1 Burr. 188, better reported, 1 East, 647,

from the MSS. of Lord *Ashburton*, per *Denison*, J.

(*b*) R. & R. C. C. R. 258.

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ticular thing, and the general term will not be sufficient (*a*). Again, the uniform course of all the precedents in similar cases has been to give a specific local description, although the words of the statute were general. Thus in 3 *Chitt. C. L.* 1132, although the 9 *Geo.* 1, c. 22, has only "head or mound of any fish pond," yet the precedent is of "a certain fish pond in a certain orchard belonging to *J. D.* there."

TAUNTON, J.—How would you describe it?

Greaves.—By its name, if it had one, which appears to be the case here, by the commitment; if it had no name, by its locality with reference to other places, which had names. It ought also to be shewn whether it was inclosed or common. The description here is more vague than in a declaration in trespass. It is not even called the close of any one.

TAUNTON, J.—"Close" is as vague as "land."

Greaves.—The action of trespass affords a very strong argument. There, if the plaintiff does not describe the



the offence in the conviction be the same as that alleged in the commitment, the conviction is no justification of the commitment. *Rogers v. Jones* (a). Now, how can it be said that the offence described in the commitment here is the same as that in the conviction? Unless it be decided that "land" and "common" within this statute are the same thing. That is impossible.

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TAUNTON, J.—I have no hesitation in saying that this conviction is a good one. By section 45, it is provided, "that no summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise, into any of his Majesty's superior Courts of record, and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same." If in this instance the warrant of commitment be bad, the party would not be entitled to be discharged, if it be alleged that it is founded on a conviction, and that there is, in point of fact, a good and valid conviction to sustain the same. We must see, therefore, whether there has been in fact a conviction. It could not have been brought up by *certiorari*, on account of the provision in the first part of the section. A verified copy of it, however, has been produced, and we are at liberty to look at that. One objection is, that it does not identify the land, whereon the offence was committed, with sufficient certainty. But I do not know what additional description would be sufficient, if this be insufficient. It has been said that it should have been called "a close," and that it should have had a name given to it; but it does so happen, that there are many closes in a county which have never had any name given to them.

(a) 9 D. & R. 878; S. C. 3 B. & C. 409.

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 ———
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 v.
 MELLOR.

Giving a name, therefore, in such a case, would not at all improve the description. If you give a name to it, there is no security against other closes having the same name. As to the case in *Sayer*, it is perfectly distinguishable. There, summary jurisdiction was given to magistrates in cases not amounting to felony. There, if the offence amounted to felony, the magistrates had no jurisdiction; there, it was necessary to shew that the particular taking of apples was not such as would have amounted to felony. That case appears to me to have been rightly decided, but the present case is perfectly different from it. The present rule must, therefore, be discharged, but without costs.

Rule discharged, without costs.



DOE v. ROE.

Where a landlord applies to the Court to compel his tenant to give the securities required by the 1

ADDISON moved for a rule to shew cause why the tenant in possession should not enter into the recognizance required by the 1 *Geo.* 4, c. 87, in actions of ejectment brought by landlords against their tenants, and also applied to make it part of the rule, that the plaintiff should

1833

PARSLOE v. FOY.

WIGHTMAN shewed cause against a rule for reviewing the Master's taxation, on the ground that he had improperly disallowed certain costs to the plaintiff. The action was brought by an attorney resident in the country, and the cause tried in town. It was sworn that the plaintiff employed a *London* agent to attend to the conduct of the cause, but that the plaintiff, being acquainted with many important matters connected with the cause, which were not within the knowledge of the agent, and which could not conveniently form a part of his instructions, had come to town to attend the trial. The expense of this journey the Master disallowed, and the present rule was obtained on the ground that the disallowance was improper. He contended, that, as the attorney had employed an agent to conduct the cause, and the cost of his attendance at the trial had been allowed, there was no pretence for saying that the costs of the journey of the attorney in the country ought to be allowed, merely because he was plaintiff in the action.

Where a *London* agent has been employed to attend the trial of a cause, it is a matter within the discretion of the Master, whether the costs of a journey to *London* by the country attorney to attend the trial of the cause shall be allowed.

John Jervis in support of the rule, contended that the attendance of the attorney himself having been sworn to be necessary, the expense of his coming to *London* ought to have been allowed.

TAUNTON, J.—This is a matter peculiarly fit for the consideration of the Master. Considering that he has exercised a due diligence and proper attention on the subject, that he has arrived at a conclusion as to the propriety of which he has no doubt, I see no reason for disturbing his taxation. The present rule must therefore be discharged with costs.

Rule discharged, with costs.

1833.

WILSON v. JOY.

The omission of the name of the chief clerk of the *King's Bench*, on a writ of summons, is not an irregularity.

WORDSWORTH moved for a rule *nisi*, to set aside a writ of summons, on the ground, that the name of the chief clerk of the *King's Bench* did not appear upon it. He admitted that the writ was perfectly conformable with the form given in the schedule to the 2 & 3 *Will.* 4, c. 39, the Uniformity of Process Act.

TAUNTON, J.—I think it is sufficient if the writ of summons is conformable to the form given in the schedule of the act.

Rule refused.

RESE v. FENN.

A conditional order for payment of costs cannot be enforced by attachment, although the step to be allowed on payment of

CHILTON shewed cause against a rule *nisi*, for an attachment for non-payment of costs pursuant to a Judge's order. The order had been obtained by the defendant, for striking out a plea on payment of costs to the plaintiff. The plea was struck out, but the costs not paid. This was a conditional order, and no attachment could be obtained

injustice would be done to the plaintiff unless he was allowed to proceed by attachment, as the defendant had taken the plea off the file without paying the costs ordered to be paid.

1833.

RESE
v.
PENN.

TAUNTON, J.—The order here was conditional, that the defendant should be allowed to withdraw his plea on payment of costs. That is strictly analogous to the granting a new trial on payment of costs. I cannot, however, find any instance of an attachment being moved for in the one case or the other, where a party has not paid the costs, and has yet been permitted to do the thing, which was the consideration of the payment of costs. If a party permits a new trial to be had without payment of costs, I do not think he is at liberty to come forward, and obtain an attachment for the non-payment of those costs. An attachment cannot issue for a mere breach of promise, but only for a contempt. I do not think that this is a case, in which the non-payment of costs can be considered as a contempt; and therefore I do not think that payment can be enforced by attachment. The present rule must therefore be discharged, but without costs.

Rule discharged, without costs.

RIDGWAY v. BAYNTON.

RISING moved for a rule *nisi* to compute principal and interest on a bill of exchange, and proposed that the service of the rule should be on the porter of the Junior United Service Club. The affidavit on which he moved, stated that the deponent believed the defendant to be a member of the club; that the bill had been accepted payable at that Club House; that the process had originally been

Service of process.

1833.

RINGWAY
v.
BAYNTON.

served there on *Maltby* the porter, who stated, that the servant of the defendant called there every day to receive messages or letters which might have been left for the defendant.

TAUNTON, J.—You may take a rule to shew cause, and let the service of the process be as it was.

Rule *nisi* granted.

The rule was afterwards made absolute on a similar service.

DOE v. ROE.

Service in eject-
ment.

ERLE applied for a rule *nisi*, for judgment against the casual ejector, on the following service:—The person attempting to serve the process stated that he had called at the premises, and delivered the declaration, with a proper explanation, to the servant of the tenant in possession, who promised to give it to the tenant. The deponent afterwards saw the declaration, on the same day, in the hands

nor given a rule for better bail, as by the practice of the Court he was required. He cited *Gibbon v. Dove* (a) as an authority upon the point.

1833.
SUTCLIFFE
v.
ELDRED.

Cowling shewed cause against the rule, and produced an affidavit, which stated, that the bail put in were mere sham bail, who attended at Serjeants' Inn; and that one of the bail had told the person making the affidavit, that he did not intend to justify, as he had only been put in for time.

Mansel, contra, submitted that the plaintiff had waived the right to treat the bail as a nullity by excepting to them.

TAUNTON, J.—I believe the practice is, that there should be a notice of exception, and a rule for better bail served; but I do not think this case depends upon that point. It appears, from the affidavit on the part of the defendant in error, that these bail, or at least one of them, were sham bail. On the authority of the cases of *Ward v. Levi* (b), and *Crum v. Kitchen* (c), I think that the defendant in error was justified in treating the bail as a nullity, and issuing execution. In this case, it is not suggested that there was any real error on the face of the record. The present rule must therefore be discharged, and with costs.

Rule discharged, with costs.

(a) 6 Mod. 230.

(b) 1 B. & C. 268; S. C. 2 D. & R. 421.

(c) 2 D. & R. 421; S. C. 1 B. & C. 269.

1833.

DOE *v.* ROE.

If a declaration in ejectment is intitled of a term which has not yet arrived, the error is immaterial.

HOGGINS moved for judgment against the casual ejector. The peculiarity in the case was, that the declaration was intitled "*Easter Term, 4 Will. 4,*" no such term having as yet arrived. This was, however, held to be an immaterial error in an *Anonymous* case, in 2 *Chitt. Rep.* 172.

TAUNTON, J.—That is sufficient.

Rule granted.

BARNETT *v.* HARRIS, Clerk.

Where a defendant is detained in the custody of the warden on process issuing out of the *K. B.*, the declaration should state him to be in the custody of the warden, and it is not necessary to bring him up by *hab.*

HOGGINS shewed cause against a rule for setting aside a declaration, on the ground of its alleging that the defendant was in the custody of the warden of the *Fleet*, the process issuing out of the Court of *King's Bench*. This, he contended, was perfectly regular, as the defendant was actually in the custody of the warden, under a writ of detainer. By the 2 & 3 *W. 4*, c. 39, s. 8, it is provided, that, where process issues against a prisoner in the custody

cessary to bring the defendant up by *habeas corpus*, in order to charge him with a declaration. Where he was in the custody of the sheriff, it was not necessary to do so. Since the 2 & 3 W. 4, c. 39, s. 8, it is directed that proceedings against prisoners in the custody of the marshal or the warden shall be as against prisoners in the custody of the sheriff. It is not necessary to bring up a prisoner in the custody of the warden by *habeas corpus*, in order to charge him with a declaration, the same section directing that the defendant is to be alleged to be in the custody of the marshal or the warden, as the fact may be. I am therefore of opinion that the present rule should be discharged with costs.

Rule discharged, with costs.

1833.
BARNETT
v.
HARRIS.

TOMKINS v. CHILCOTE.

ADDISON shewed cause against a rule *nisi* for setting aside the service of process on an attorney, on the ground that the amount of debt and costs demanded by the plaintiff had not been indorsed upon it, pursuant to 2 Reg. Gen. H. T. 2 W. 4 (a). He contended that the words of the rule were merely directory, and not compulsory. In the construction of a rule similar in terms to the one in question, which required the indorsement of the day of the month and year on process, the Court of *Exchequer* held that it was directory, and not compulsory (b).

2 Reg. Gen. H. T. 2 W. 4, as to the indorsement of the amount of debt and costs demanded by the plaintiff applies to process issued against attorneys under 2 & 3 W. 4, c. 39.

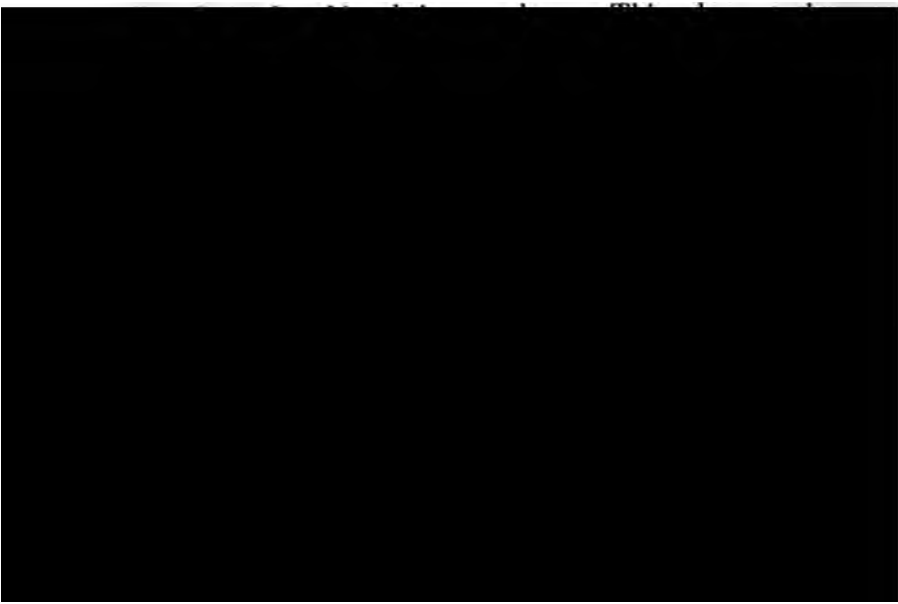
TAUNTON, J.—I shall offer no opinion as to the construction which the Court of *Exchequer* may have put upon a different rule; but it appears to me, that this rule must be considered as compulsory, or it will be perfectly useless.

(a) *Ante*, Vol. 1, p. 198. (b) *Millar v. Bowden*, 1 C. & J. 563.

1833.
TOMKINS
v.
CHILCOTE.

Addison.—Although the rule might be considered as compulsory in the case of an ordinary person, yet this is the case of a defendant who is an attorney; and, in *Lewellin v. Norton* (a), it was held, that a bill against an attorney was not “process” within the meaning of the rule of *Hilary* Term, and therefore did not require the indorsement directed by that rule. Now, by the Uniformity of Process Act, 2 & 3 W. 4, c. 39, s. 1 (b), it is provided, that attornies shall be sued by the same process as other persons; and, by 5 Reg. Gen. M. T. 3 W. 4 (c), the rule of *Hilary* Term is made applicable to all process issued under the authority of that act. Consequently, as before that act it was not necessary to make the indorsement in question on a bill against an attorney, it is not now necessary to make it on process issued under the authority of that act.

TAUNTON, J.—The case of *Lewellin v. Norton* is quite different from the present. The question there was, whether a bill against an attorney was process. A bill against an attorney is not process, for it is in the nature of a declaration. This case, therefore, comes within the principle of *Ryley v. Boissomas* (d), in which it was held by the



1833.

BEST v. PRIOR.

ERLE moved for judgment in favour of the defendant in error. The plaintiff in error had not delivered his paper books in due time, but the defendant in error had delivered them all.

If a plaintiff in error does not deliver his paper books in due time, and the defendant in error delivers them all, the latter is entitled to judgment.

Mansel opposed the application.

TAUNTON, J.—It is clear, from the practice of the Court, that, if the plaintiff in error does not deliver his paper books, and the defendant does, the latter is entitled to judgment (a).

Judgment for the defendant in error.

(a) See 2 Tidd's Prac. 1176, ed. 9.

GETHIN v. WILKS.

GALE v. WILKS.

THIS was an application by the sheriff for relief under the 1 & 2 W. 4, c. 58, s. 6, the Interpleader Act. It appeared that the sheriff had made a seizure under writs of *f. fa.* on judgments entered up on warrants of attorney. The landlord gave notice before sale, under the 8th of *Anne*, c. 14, s. 1, of rent in arrear. Afterwards, notice was given of a fiat of bankruptcy issued against the defendant. Under these circumstances, the sheriff applied to the Court for relief. On shewing cause, no one appeared for the execution creditors, it being admitted that the executions were void under the 6 *Geo.* 4, c. 16, s. 108. The only question, therefore, was, whether the assignees were entitled to the proceeds of the sale, without deducting the half-year's rent claimed by the landlord.

In order to enforce a landlord's claim for rent in arrear, against assignees, after a seizure under a *f. fa.*, he must distrain.

1833.

GETHIN
v.
WILKS.*Chilton* appeared on behalf of the sheriff.

Addison appeared on behalf of the assignees. He contended, that, as the landlord had not made a distress, and thus legally enforced his rights, and as the fiat of bankruptcy had preceded the sale, the assignees were entitled to the proceeds of the sale. In order to entitle the landlord to receive any part of those proceeds under the 6 *Geo. 4*, c. 16, s. 74, he ought to have enforced his claim by distress.

Cur. adv. vult.

TAUNTON, J.—I think it is perfectly clear, that, in order to entitle the landlord to any part of the proceeds of this sale, under the 6 *Geo. 4*, c. 16, s. 74, he ought to have enforced his rights by legal process. I have consulted the other Judges, and the conclusion at which we have arrived, is, that the assignees are entitled to the full proceeds of the sale. If the sheriff had paid over the amount of the landlord's claim to him, before he received notice of the fiat, the case might have been different; but, in the present state of facts, it is impossible to say that the landlord is entitled to his rent, to the prejudice of the claim set up by the assignees. The landlord not having enforced his

therefore appears to me, that the assignees are entitled to the whole proceeds of the sale. The sheriff, therefore, must pay over the proceeds of the goods sold to the assignees, and retire from the possession of those which are unsold. Each party will pay his own costs.

1833.
 GETHIN
 v.
 WILKS.

Rule discharged accordingly.

GREEN v. FOSTER (a Prisoner).

IN this case, a writ of *fi. fa.* had been issued in pursuance of a judgment in an action of debt against the defendant, indorsed "Levy 8*l.*—besides," &c. The sheriff levied 9*l.* as appeared by his return to the writ, which had been filed. For the residue of the debt, the plaintiff issued a writ of *habeas corpus ad satisfaciendum*; at the end of which was a memorandum—"Levy 80*l.*"

Where a part of a debt has been levied, and the defendant is detained on a *hab. corp. ad satisfac.* for the residue, it is not necessary to refer on the latter writ to the amount of the levy made.

Mansel obtained a rule *nisi* to set aside the *habeas corpus ad satisfaciendum*, on the ground that it did not refer on its face to the writ of *fi. fa.* and the levy made under it.

Where 1 Reg. Gen. H. T. 2 W. 4, s. 5, as to the addition of deponents, need not be strictly complied with.

Sewell shewed cause, and objected, that as the only mode in which the *habeas corpus* came before the Court was by the affidavit of a clerk to the defendant's attorney; and as such affidavit did not comply with the rule of M. T. 15 Car. 2, 1663 (a), and 1 Reg. Gen. H. T. 2 Will. 4, s. 5 (b), in stating the address and addition of the deponent, the rule must be discharged.

(a) The words of the rule are, "it is ordered, that the true place of abode, and true addition of every person who shall make affidavit in Court here, shall be inserted in such affidavit."

(b) See *ante*, Vol. 1, p. 184.

1833.

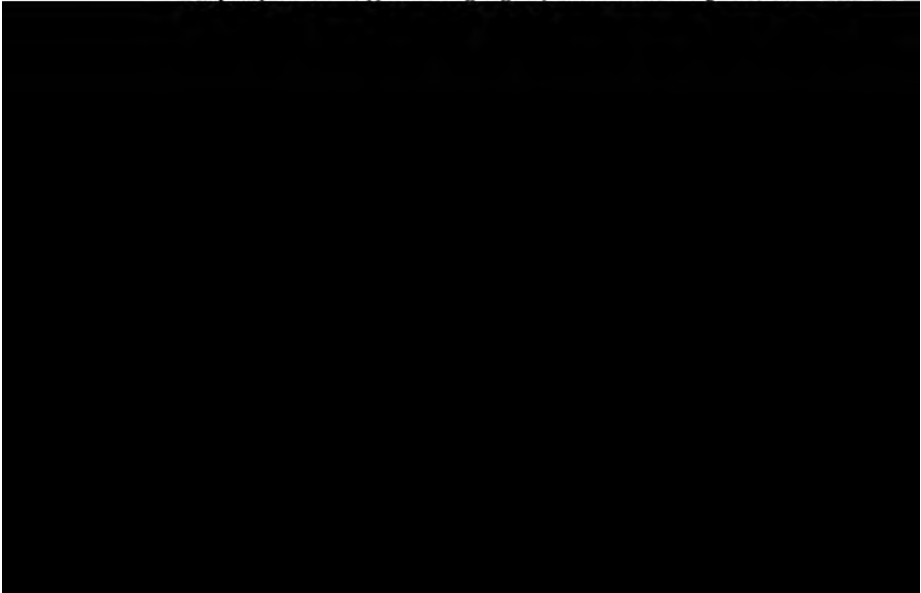
GREEN
v.
FOSTER.

Mansel, in support of the affidavit, contended, that as the address and addition of the deponent were inserted at the end of the examined copy of the *habeas corpus* and return, which was an exhibit to the affidavit, it was sufficient; and that the fact of its being an examined copy appeared from the affidavit of the defendant, which stated that it was an examined copy, although it did not state that it was examined by the defendant; but that statement was not necessary.

TAUNTON, J.—(After referring to the original affidavit and exhibit, which were in Court)—I think it will be better to proceed to the merits of the motion.

Sewell then shewed cause, and contended, that it was not necessary that there should be any reference on the face of the *habeas corpus ad satisfaciendum* to the writ of *fi. fa.*

Mansel, in support of the rule, admitted that there was no direct authority on this point; but he contended, that, as the action was in debt, there ought, upon principle, to have been a memorandum at the end of the writ of *habeas corpus*, referring to the *fi. fa.*, and the levy which had



returned, there is something to bind the plaintiff, and to limit for how much he should have the body, by shewing how much he has already gotten. In *Wilson v. Kingston (a)*, a defendant was discharged out of custody on a *ca. sa.*, which recited a prior *fi. fa.* and levy, but omitted the sheriff's return.

1833.
—
GREEN
v.
FOSTER.

TAUNTON, J.—There appears to be no decision on this point; and, in the absence of such a decision, I think that the memorandum to detain the defendant for 80*l.*, which is the undisputed amount of the residue, is sufficient, and that the rule must be discharged. That memorandum clearly shews the sum for which the defendant is to be detained; and, consequently, gives all the information which is necessary to the person in whose custody he is.

Rule discharged, with costs.

(a) 1 Chitt. Rep. 134, n. (a).

ENGLEHEART v. EYRE and Another.

THIS was an action on the recognizance of the defendants, who had become bail for a person named *Dunbar*, who had been sued by the plaintiff in an action of *assumpsit*. In that action the defendant pleaded, first, the general issue; and, secondly, a set-off. Issue was joined on both these pleas. A verdict was found by the jury in favour of the plaintiff. The bail not having rendered their principal, the plaintiff brought an action on the recognizance. The plaintiff having declared, the defendant pleaded *nul tiel record*, and, on inspection of the record, it was discovered that there was a variance between it and the declaration. The declaration stated that the judgment against the principal was obtained on the 15th *March*,

An order to amend, although general in its terms, will only authorise the amendment with reference to which it is obtained.

1833.
ENGLEHEART
v.
EYRE.

but the judgment appeared by the record to be of *Easter* Term, 1833. The Court gave leave generally to amend the original record according to the fact, as the judgment had been recovered on the 15th *March*. The original record, however, only contained a finding of the jury on the general issue, and no finding on the plea of set-off. The attorney for the bail applied to the plaintiff to be allowed to inspect the *postea*, in order to see whether it agreed with the original record, as, if it did, the bail would be at liberty to avail themselves of the defect. This however was refused. It was suggested that the plaintiff had inserted in the *postea* a finding of the jury on the plea of set-off, which did not exist in the original record, and had thus exceeded the authority to amend granted by the order, which, although general, only applied and was only intended to apply to the amendment of the date of the judgment. A rule *nisi* was therefore obtained to set aside such amendment if any such had been made, and to allow the attorney for the bail to inspect the *postea*.

Thesiger shewed cause.

Mansel supported the rule.

1833.

TOOMER *v.* FULLER.*(Before the Four Judges.)*

BALL obtained a rule *nisi* for rescinding a Judge's order, which required the plaintiff's attorney to pay the costs of taxing his bill, on the ground that more than a sixth had been taken off by the master. It appeared that the bill of costs was delivered to the plaintiff on the 18th *February*, 1833. The summons to tax the bill was served on the attorney on the 21st *March*, more than a month after the bill had been delivered. The order for taxation was made on the 25th *March*. In the mean time, viz. on the 20th of *March*, a writ had been issued by the attorney against his client the plaintiff, but the writ had not been executed in consequence of the service of the summons on the 21st of *March*. He cited *Jay v. Coaks* (a), in which it was decided, that, where a Judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the master. He also cited *Harbin v. Miles* (b).

Where an attorney brings an action to recover the amount of his bill, and after action brought his bill is taxed, he is not bound to pay the costs of taxation, unless it appears that the action was brought to avoid those costs.

Platt shewed cause, and contended that it must be inferred from the affidavits, that the attorney knew of a summons having been taken out before the writ issued, and that the object of the writ, therefore, was to avoid the costs of taxation.

The Court referred the rule to the master, to ascertain whether the writ had been issued merely for the purpose of avoiding the costs of taxing the bill. If he should be

(a) 8 B. & C. 635.

(b) 9 B. & C. 755.

1833.
 ———
 TOOMER
 v.
 FULLER.

of opinion that the writ was issued for that purpose, the rule was to be discharged: if not, to be made absolute; and the costs of the application and the reference to be in the discretion of the Master.

The Master heard the parties, and being of opinion that the writ was not issued in order to avoid the costs of taxation, the rule was therefore made

Absolute.

DOE v. ROE.

If the term in which a declaration in ejectment requires an appearance to be made is suffered to elapse, judgment against the casual ejector may be obtained in the following term on the same service.

STEER moved for judgment against the casual ejector. The service was in *Hilary* vacation, and an appearance was required in *Easter* Term. No application was made in that term for judgment, and the motion now was in *Trinity* Term to be allowed to sign judgment against the casual ejector. He cited *Doe v. Roe (a)*, in which Mr. Justice *Littledale*, on a similar application, observed, "If you only allow one term to go by after the service, I can grant the rule; but if you permit two terms to elapse, I cannot grant it. It is contrary to the practice of this

1833.

ROGERS' BAIL.

MARTIN applied for time to justify bail in error, on the ground of the bail having been forced suddenly to leave town on particular business.

In order to obtain time to justify bail in error, on account of the bail suddenly leaving town, it must be sworn that the fact of such departure was a surprise on the defendant.

TAUNTON, J.—I do not think you ought to have time to justify. You have no statement in your affidavit that the fact of the bail leaving town was a surprise upon you. For any thing that appears, this may be a mere contrivance between the bail and the defendant.

Time refused.

JENKINS v. CHARITY.

WORTLEY shewed cause against a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice. The affidavit in opposition to the rule stated that the notice of trial had been countermanded at the request of the defendant.

If notice of trial be countermanded at the request of the defendant, he cannot obtain judgment as in case of a nonsuit, on the ground of not proceeding to trial pursuant to notice.

R. V. Richards, in support of the rule, contended that moving for judgment as in case of a nonsuit was only a proceeding for the purpose of pressing on the plaintiff; and, therefore, although the defendant might have requested the plaintiff on one occasion to countermand his notice of trial, he had not thereby waived his right to press on the plaintiff to trial.

TAUNTON, J.—The reason why the plaintiff did not proceed to trial was, that the defendant requested him to countermand his notice. There was therefore no default on the part of the plaintiff. No default existing on the

1833.
JENKINS
v.
CHARITY.

part of the plaintiff, the defendant can have no right to move for judgment as in case of a nonsuit. The motion ought in fact never to have been made. The rule must therefore be discharged, with costs.

Rule discharged, with costs.



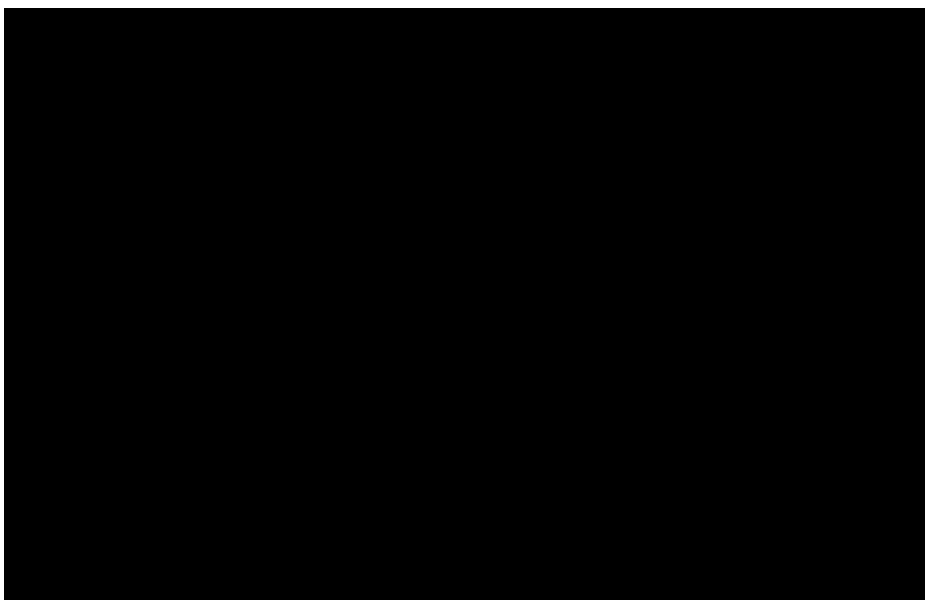
DOE v. ROE.

Service in eject-
ment.

N. C. ROWE moved for judgment against the casual ejector. The affidavit on which he founded his motion was jointly made by the person serving the declaration and the housekeeper of the tenant in possession. The former deponent stated a service, with the proper explanation, on the housekeeper on the premises; the latter stated that she had delivered the declaration to the tenant in possession.

TAUNTON, J.—You may take a rule to shew cause.

Rule *nisi* granted.



of it, and thus avoid an indictment for perjury, while the plaintiff would be left without substantial bail.

Bail rejected.

1833.

HARRISON'S
Bail.

Ex parte JONES.

W. H. WATSON applied to re-admit a country attorney, on an affidavit which stated that his agent having by mistake supposed that he had been on the roll for a period less than three years, had, for some time, only paid 4*l.* a year duty instead of 8*l.*: the agent had also omitted, by accident, to take out his certificate for the current year. The affidavit admitted that *Mr. Jones* had practised during this time, but was not aware of the defects stated as to his certificate. The consent of the Stamp Office had also been obtained.

Where an attorney has by accident omitted to pay the proper amount of certificate duty for some years, as also to take out his certificate during another period, and has practised during that time, the Court will re-admit him on payment of the arrears of duty and a nominal fine.

PATTESON, J.—Let him be re-admitted on payment of the arrears of duty, and taking out his certificate for the present year, and paying a fine of 20*s.* to the king.

Rule accordingly.

DOE v. ROE.

MANSEL moved for judgment against the casual ejector. His affidavit of service stated a service on the wife, on the premises, and that the person serving it had read over the notice, but did not go on to state that he had explained it. He cited the case of *Doe v. Roe* (a), in which *Mr. J. Patteson* had decided, that reading over the declaration without explanation would suffice.

Service of the declaration in ejectment on the wife on the premises, and reading over the notice without explaining it, is sufficient.

PATTESON, J.—I think I went too far in the case cited,

(a) *Ante*, Vol. 1, p. 428.

1833.

DOE
v.
ROE.

because the declaration conveys no information to the tenant in possession. But in this case I think you may have your rule, because reading over the notice without explanation has been held sufficient.

Rule granted.



DOE d. THOMPSON v. MIREHOUSE.

Where a sheriff's officer taking possession under a *hab. fac. poss.* is dispossessed before he delivers possession to the lessor of the plaintiff, it is necessary that it should appear that the persons dispossessing are acting in concert with the defendant.



ADDISON moved for a fresh writ of possession in this case. The sheriff's officer who took possession of the premises under the authority of the first writ, had been turned out of possession before he could deliver it to the lessor of the plaintiff. The affidavit on which he moved stated that the deponent believed the parties committing the violence were combining with the defendant, in order to prevent possession being delivered. As possession had never been delivered, the lessor of the plaintiff, he contended, was entitled to a fresh writ of possession. Mr. *Tidd*, in Vol. 2, p. 1247, ed. 9, of his Practice, laid it down, that, where a defendant turned out the plaintiff "immediately, or soon after the possession is delivered, the plaintiff, it seems, may have a new writ of *habere facias* before the former writ is returned, because the



1833.

HILLARY v. ROWLES and his Bail.

[Before the four Judges.]

PLATT obtained a rule *nisi* for setting aside proceedings on the bail-bond, on the ground of their having been taken too soon. The defendant was arrested on the 7th of *May*, and the bail-bond given was put in suit on the 15th. This, he contended, was too soon; for, by 1 Reg. Gen. H. T. 2 Will. 4, s. 24 (a), it was directed, that "no bail-bond taken in *London* or *Middlesex* shall be put in suit until after the expiration of four days, nor, if taken elsewhere, till after the expiration of eight days, exclusive from the appearance day of the process." Here, the bail-bond was taken in the county of *Middlesex*. By the exigency of the *capias*, the defendant is required to put in special bail within eight days after the execution of the writ, inclusive of the day of such execution. The time for putting in bail, therefore, expired on the 14th, and four days being to elapse before the bail-bond could be put in suit, it could not properly be put in suit until the 19th. It was, however, put in suit on the 15th; and, therefore, the action was brought four days too soon.

If a defendant does not put in special bail within eight days after the execution of the *capias*, inclusive of the day of execution, the plaintiff may proceed on the bail-bond immediately.

Archbold shewed cause against this rule, and contended that the rule of H. T. 2 W. 4, was no longer in force, for it had been superseded by the Uniformity of Process Act, 2 & 3 W. 4. c. 39. The warning at the end of the writ of *capias* contained these words, "if a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond." How the bail was required to be put in, appeared from the language of the writ itself,

(a) *Ante*, Vol. 1, p. 186.

1833.
 HILLARY
 v.
 ROWLES.

which was "within eight days after execution, inclusive of the day of such execution." Here, the bail had not been put in as required by the writ, and therefore the plaintiff was at liberty to put the bail-bond in suit at the expiration of the eight days. They had expired on the 15th, and therefore proceedings on that day were regular.

Per Curiam.—We think that the operation of the 2 & 3 Will. 4, c. 39, has been to supersede the rule of H. T. 2 W. 4. The action, therefore, was properly brought on the 15th.

Rule discharged, without costs.

ENGLEHART v. DUNBAR.

If a *ca. sa.* is tested of a term previous to the judgment, or when issued under the statute 1 Will. 4, c. 7, s. 13, if not tested on the day it issues, it is irregular, but the Court will per-

IN this case, a verdict was given against the defendant in *Hilary* vacation; and the learned Judge who tried the cause, in pursuance of the 1 Will. 4, c. 7, s. 2, granted speedy execution. Judgment was signed on the 15th of *March*, and execution immediately issued. The *ca. sa.* was tested on the last day of *Hilary* Term. An action of debt on the recognizance of bail was afterwards brought

against bail, on the ground of the *ca. sa.* being tested of a term prior to that in which judgment was signed against the principal. In support of the second point, he cited *Rex v. Commissioners of the Flockwold Inclosure (a)*, in which it was held, that the words "shall and may" are imperative, when the clause is for the public good or benefit.

1832.
 ENGLEHART
 v.
 DUNBAR.

Thesiger shewed cause against the rule, and contended, that, although the *ca. sa.* was irregular by the improper *teste*, yet such an irregularity the Court would permit to be amended on payment of costs.

Mansel, contra, contended, that, as this application was made at the instance of the bail, the Court would not allow such an amendment to be made as against them, particularly after the decision in the case of *Gawler v. Jolley*.

PATTERSON, J.—I think, that, even as against the bail, this amendment ought to be allowed on payment of costs.

Rule accordingly.

(c) 2 Chitt. Rep. 251.

Ex parte PILKINS.

WATSON moved to re-admit an attorney. The rule with respect to the notice of his intention to apply for re-admission had been obeyed, with the exception that the notice in the *King's Bench* Office, had not been stuck up until the opening of the office on the first day of this term. The reason given for this omission was, that he did

An attorney seeking to be re-admitted, sufficiently complies with the rule as to a term's notice previous to his application, by sticking it up in the *King's Bench* Office on the morning of the first day of the term in which he applies, at the opening of the office.

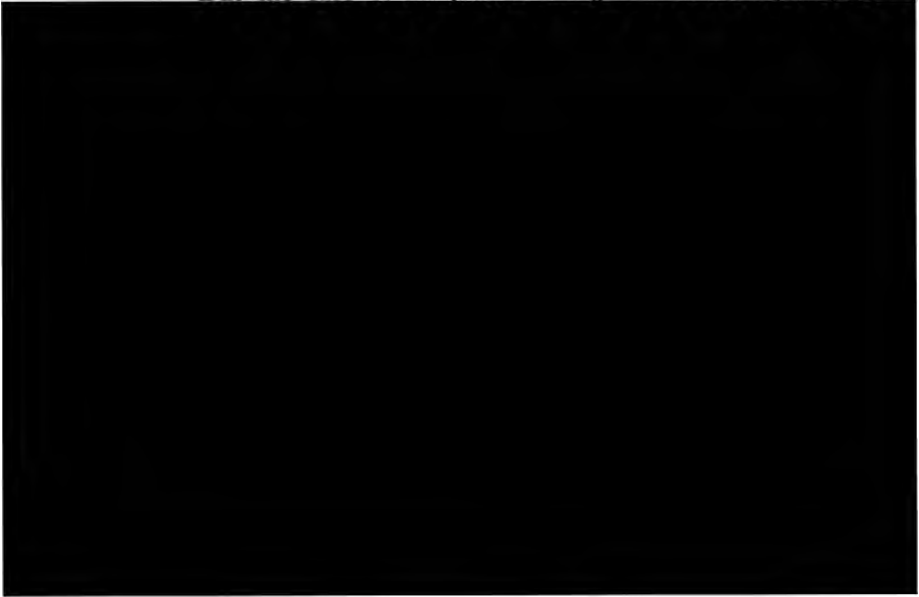
Office on the morning of the first day of the term in which he applies, at the opening of the office.

1833.

Ex parte
PILKINS.

not go to the office on the previous day until it was closed. He submitted, however, that the notice having been stuck up on the morning of the first day of the term, at the opening of the office on the first day of the term in which he applied for re-admission, was sufficient. He cited the case of *Ex parte Senior (a)*, in which a similar application was made under similar circumstances, the day previous to the first day of term being a holiday at the *King's Bench* Office. That case was decided on the authority of *Ex parte Davey (b)*, in which a similar application was made, and the attorney affixed his notice outside the Court in the morning before it sat on the first day of the term of which notice was intended to be given. The Court, in both those cases, allowed the attorney to be re-admitted, as it was of opinion that such a proceeding was a sufficient compliance with the rule of *Trinity Term*, 33 *Geo. 3*.

TAUNTON, J.—The present case differs from that of *Ex parte Senior*, because there the day previous to the first day of the term was a holiday. Here it was not; but the reason of the notice not being affixed in the *King's Bench* Office previous to the term was, the neglect of the party himself in not applying sufficiently early. But the case of *Ex parte Davey* is an authority in your



rule. On consulting the other Judges, however, the Court was unanimously of opinion, "that a notice affixed before the sitting of the full Court, on the first day of term, was sufficient, and therefore granted the application." That case, therefore, is a precedent for your application. The attorney may be re-admitted.

1833.

Ex parte
PILKINS.

C. Cresswell, amicus curiæ, mentioned a similar application, which he lately successfully made, under similar circumstances, to the full Court.

Re-admitted.

END OF TRINITY TERM.

COURT OF COMMON PLEAS

Easter Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

1833.

GOODBURNE v. BOWMAN.

If the jury find immaterial issues in favour of a defendant, and the plaintiff has afterwards judgment *non obstante veredicto*, neither party is entitled to the costs of those issues.

IN this case, a rule *nisi* for reviewing the Prothonotary's taxation was obtained, and cause shewn against it. It appeared, that, at the trial, several issues were raised, and a number of them found for the defendant. On application subsequently to the Court, it was of opinion that those issues were immaterial, and judgment was given for the plaintiff, *non obstante veredicto*. On taxation, the Prothonotary refused to allow either the plaintiff or the defendant any costs upon these immaterial issues, according to the construction which he put on 1 Reg. Gen. H. T. 2 W. 4, s. 74(a).

fendant—issues found in his favour must of course mean such issues as in point of law he can ultimately succeed upon. But the Court has decided that the defendant is not to have judgment upon those issues. The present is a *casus omissus*; and it is therefore better to decide that neither party shall have his costs.

Rule discharged.

1833.
GOODSURN
v.
BOWMAN

BOWYEAR v. BOWYEAR.

THE demandant in this case, which was a writ of right for the recovery of land in the county of *Middlesex*, had brought two actions of ejectment in the Court of *King's Bench*, for the same land. In both, he had failed. A rule *nisi* was obtained, calling on the demandant to shew cause why the proceedings in the writ of right should not be stayed until the costs of the two ejectments were paid.

Where a writ of right is brought to recover land which has been the subject of an unsuccessful action of ejectment, the Court will not stay the proceedings in the writ of right, until the costs of the ejectment are paid.

Ludlow, Serjt., shewed cause, and cited *Chatfield v. Souter* (a), in which case the Court had refused a similar application.

Wilde, Serjt., in support of the rule, endeavoured to distinguish the case cited from the present.

Per Curiam.—We cannot distinguish the present case from that of *Chatfield v. Souter*. The present proceeding is quite different from that of an ejectment. We do not know why the ejectments have failed. Their failure may have been caused by something quite consistent with the demandant's present right to recover. His right of entry might have been tolled, or the action may have been brought after the twenty years had elapsed. For any thing

(a) 3 Bing. 167.

1833.
 ———
 BOWYEAR
 v.
 BOWYEAR.

therefore that appears, the present writ of right may have been rendered necessary from the inefficacy of the previous ejectments.

Rule discharged.

MARSHALL and Another v. THOMAS.

If the form of action is misdescribed at the commencement of a declaration, it is an irregularity, and not a ground of special demurrer.

ASSUMPSIT on a bill of exchange. The declaration commenced by alleging the defendant to have been summoned to answer the plaintiff "of a plea of trespass on the case," and then proceeded to allege the cause of action. To this the defendant demurred specially, on the ground that the plaintiff had misdescribed the form of action.

Wilde, Serjt., in support of the demurrer, contended that the declaration was bad on special demurrer, as, according to the rule of Court, M. 1654, s. 16, the form of action must be correctly described.

Per Curiam.—The misdescription of the form of action only amounts to an irregularity, as it is only a non-compliance with a rule of Court. Nothing illegal appears on the face of the record.

on taxation, allowed the defendant the costs of the cause. A rule *nisi* was obtained for reviewing the taxation.

1833.
 WOOLLEY
 v.
 SLOPER.

Wilde, Serjt., shewed cause, and contended, that although, in general, an executor might not be liable to pay costs, the wilful negligence of the plaintiff in the present instance deprived him of that privilege. He cited *Shaw v. Mansfield* (a), and *Nunex v. Modigliani* (b).

Bompas, Serjt., supported the rule, and cited *Booth and Others v. Wood* (c), *Hawes v. Saunders* (d), and *Harris v. Jones* (e).

TINDAL, C. J.—As the plaintiff in this case could only sue on the contract made with the testator, he would not have been liable to pay costs, if he were nonsuited at the trial. The statute of the 14 Geo. 2, c. 17, provides, “that all judgments given by virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force and effect;” and then it proceeds, “that the defendant or defendants shall, upon such judgment, be awarded his or their costs, in any action or suit where he, she, or they would, upon nonsuit, be entitled to the same, and in no other action or suit whatever.” By the clear language of the act, therefore, the defendant cannot be entitled to his costs of the cause. The present rule must be made absolute for the review of the Master’s taxation, such costs being allowed to the defendant as the wilful negligence of the plaintiff in not proceeding to trial has occasioned.

Rule absolute accordingly.

(a) 7 Price, 709.

(d) 3 Burr. 1584.

(b) 1 H. Black. 217.

(e) 3 Burr. 1451.

(c) 2 H. Black. 277.

END OF EASTER TERM.

VOL. II.

P

D. P. C.

1833.

Trinity Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

KEYS v. SMITH.

The Court will waive the strict rules as to change of *venue* in favour of liberty.

IN this case the defendant had been arrested on a bill of exchange. The cause stood for trial at the last *Taunton* Assizes, and was made a special jury cause at the instance of the defendant. When it was called on, a sufficient number of special jurors did not appear, and neither party would pray a *tales*. It accordingly stood over. Afterwards, the defendant was rendered by his bail, and remained a prisoner in the *Fleet*. On an affidavit of these facts, a rule *nisi* was obtained for changing the *venue* from *Somersetshire* to *Middlesex*, on the terms of the defendant paying to the plaintiff the extra expense consequent on trying in *Middlesex* instead of *Somersetshire*, as all the plaintiff's witnesses resided in the latter county.

Wilde, Serjt., shewed cause, and submitted that the

circumstances of the case, they might deviate from the strict practice of the Court, and grant the present application.

Rule absolute accordingly.

1833.

KEYS
v.
SMITH.

ISAAC v. SPILSBURY.

THIS was a sheriff's rule under the Interpleader Act, (1 & 2 W. 4, c. 58, s. 6). It appeared that the sheriff seized goods under a *fi. fa.*, and the defendant's wife laid claim to them, on the ground that they were vested in certain trustees to her separate use. Soon after the defendant petitioned the Insolvent Court for his discharge. On the appearance-day to the rule, the trustees of the defendant's wife disclaimed any intention to interfere, and no one appeared on the part of the provisional assignee.

In order to induce the Court to interfere under the Interpleader Act in favour of the sheriff, an actual claim to the property seized must be made.

Per Curiam.—The facts of this case do not bring it within the 1 & 2 W. 4, c. 58. In order to bring it within that act, a claim must be made to the property. Here, however, no claim is really made; but the sheriff, being alarmed, calls upon persons to come before the Court and make claims. Such a case is not within the act, and, therefore, all we can do is to discharge the rule.

Rule discharged.

A week's time was given to the sheriff, in order to sell the goods and return the proceeds.

REGULÆ GENERALES.

IT IS DECLARED AND ORDERED, That, in all cases in which a defendant shall have been or shall be detained in prison

1833.
REG. GEN.

on any writ of *capias* or detainer, under the statute 2 W. 4, c. 39, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render, and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute, 2 W. 4, c. 39, schedule No. 2; unless further time to declare shall have been given to such plaintiff by rule of Court, or order of a Judge.

T. DENMAN.
N. C. TINDAL.
LYNDHURST.
J. BAYLEY.
J. A. PARK.
J. LITLEDALE.
S. GASELEE.
J. VAUGHAN.

J. PARKE.
W. BOLLAND.
J. B. BOSANQUET.
W. E. TAUNTON.
E. H. ALDERSON.
J. PATTESON.
J. GURNEY.

REPORTS OF CASES
DETERMINED ON
POINTS OF PRACTICE.

COURT OF EXCHEQUER.

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

BOWEN v. BRAMIDGE.

1833.

THIS was an issue (arising out of the motion in *Bramidge v. Adshead*) (a), which was directed by the Court to be tried to determine the right to certain goods taken in execution by *Bramidge*. A verdict having been found in favour of *Bowen*, *R. V. Richards* obtained a rule *nisi* calling on the defendant to shew cause why the sum of 11*l.* 4*s.* should not be paid out of Court to the plaintiff, and why he should not have his costs of the action of trover and of this application.

Where an issue is tried by direction of the Court, under the Interpleader Act, the unsuccessful party is liable for the costs.

A party who applies to the Court by motion, without having made application to the opposite party to do what the rule calls on him to do, is not entitled to the costs of the rule, if

Talfourd, Serjt., shewed cause.—He said, that, if the Court put such a construction upon the act that the party

the opposite party, on shewing cause, confines himself to the question of costs.

(a) *Ante*, p. 59.

1833.

BOWEN
v.
BRAMIDGE.

who fails is to pay all the costs, it would bear very hard upon his client, but he could not oppose the present motion: he objected also to the payment of the costs of this rule, because there had been no previous application to the defendant.

R. V. Richards, contrà, contended that he was entitled to the costs of the rule, as he could not have got the money out of Court without a motion; and that, unless it was to be an universal rule that no party can have costs unless there has been a previous application, he was entitled to have this rule made absolute with costs.

BAYLEY, B.—I think the party who succeeds is entitled to the costs of the action, and that the party who fails must pay them; but, as to the costs of this rule, I think the plaintiff is not entitled to them, no previous application having been made to the defendant. If he had been applied to by *Bowen* to pay him the costs of the action, this application would probably have been unnecessary. No opposition has been made, except to that part of the rule which prayed for costs.

Vaughan, B.—All the costs ought naturally to fall on



1833.

WATSON v. ABBOTT.

THIS was an action for running down a ship. The issue in this action was tried in the sheriff's court by virtue of a writ of trial issued under the 3 & 4 Will. 4, c. 42, s. 17. Upon the trial the plaintiff was nonsuited. A rule *nisi* for setting aside the nonsuit having been obtained by *Hill*, on the ground of misdirection by the learned secondary,

The act authorizing the sheriff to try issues where the debt or demand does not exceed 20*l.* applies only to debts and pecuniary demands, and not to torts. *Semble*, that the sheriff or his deputy has the power to nonsuit.

Petersdorff shewed cause.—The secondary has the power to nonsuit.

BAYLEY, B.—I have no doubt that the secondary had power to nonsuit, for he is put in the situation of a Judge at *Nisi Prius* (a); but had he power to try such a question as this?

Petersdorff.—The order was obtained by the plaintiff.

BAYLEY, B.—You cannot insist that this is within the act. The proceedings are *coram non judice*. The act only extends to debts and pecuniary demands.

VAUGHAN, B.—The words of the act are, “any debt or demand where the sum sought to be recovered *and indorsed on the writ of summons* shall not exceed 20*l.*,” &c. There could have been no debt here indorsed on the writ.

Rule absolute for setting aside the nonsuit.

(a) This point was made by *Lyndhurst* and the rest of the *Hill* in moving for the rule *nisi*, Court appearing to be against but abandoned by him, Lord him.

1833.

WARREN *v.* SMITH.

Service of a rule
nisi to compute
on the mother of
the defendant,
at his residence,
held sufficient.

FOLLETT, in moving to make absolute a rule to compute, said that there was some doubt about the sufficiency of the service. The affidavit merely stated that the rule *nisi* was served by leaving it with the mother of the defendant, at his residence.

Per curiam.—That is sufficient.

Rule absolute.

PREEDY *v.* MACFARLANE.

Judgment as in
case of a non-
suit cannot be
moved for in the
term for which
notice of trial
had been given.

PRICE moved for judgment as in case of a nonsuit, issue having been joined last term, and notice of trial given for the first Sittings in this term; but the cause had not been set down.

VAUGHAN, B.—You cannot move in the same term in which default was made.

beginning on *Tuesday* morning. This cause stood 70 in the third list, and was not tried till *Saturday* evening, when the plaintiff got a verdict. The objection was to the allowance which had been made to the witnesses for their time. One was an attorney, and a material witness; he had been allowed eight days; others had been allowed nine days; some not so much. *Wightman* objected to this allowance, as the attorney must have known he would not be wanted at the beginning of the week. It appeared, however, that the objection had been taken before the Master, and he had decided upon it; and that the attorney had been written to by the plaintiff's agent on *Saturday*, directing him to be at *Lancaster* on the *Monday* morning, and that the defendant's witnesses were also in attendance on the *Monday*, and that the first list of causes had gone off very rapidly: these circumstances had been taken into consideration by the Master.

1833.
 —————
 PLATT
 v.
 GREENE.

LORD LYNTHURST, C. B.—If the parties acted *bond fide*, there is no ground for reviewing the discretion of the Master, though it may be true that other persons might have formed a different opinion as to the necessity of the witnesses attending so early.

BAYLEY, B.—It is a question for the Master, whether the witnesses ought to have attended on the first day; and he has decided upon it.

Rule discharged without costs.

DOE d. ——— v. BARKER.

HUMFREY moved for an attachment against the defendant, *Sarah Barker*, for non-payment of costs. The costs were taxed upon the rule for not confessing lease, entry, &c., and there was an affidavit of the Master's *allocatur*, and of a personal service on the defendant, and

An attachment for costs is now grantable without first issuing a *subpoena*.

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therefore that appears, the present writ of right may have been rendered necessary from the inefficacy of the previous ejectments.

Rule discharged.

MARSHALL and Another v. THOMAS.

If the form of action is misdescribed at the commencement of a declaration, it is an irregularity, and not a ground of special demurrer.

ASSUMPSIT on a bill of exchange. The declaration commenced by alleging the defendant to have been summoned to answer the plaintiff "of a plea of trespass on the case," and then proceeded to allege the cause of action. To this the defendant demurred specially, on the ground that the plaintiff had misdescribed the form of action.

Wilde, Serjt., in support of the demurrer, contended that the declaration was bad on special demurrer, as, according to the rule of Court, M. 1654, s. 16, the form of action must be correctly described.

Per Curiam.—The misdescription of the form of action only amounts to an irregularity, as it is only a non-compliance with a rule of Court. Nothing illegal appears on the face of the record.

Judgment for the plaintiff.

WOOLLEY, Executor, v. SLOPER, Executor.

If judgment as in case of a nonsuit is obtained in an action by an executor, he will be liable to the costs occasioned by his wilful negligence, and not to the costs of the cause.

THIS was an action of covenant by an executor, on a breach committed since the testator's death. Three notices of trial had been given, and each of them countermanded. After the third, a rule for judgment as in case of a nonsuit was made absolute. The wilful negligence of the plaintiff appeared to be the only cause of his not proceeding to trial; and the consequence was, great and unnecessary expense to the defendant. The Prothonotary,

on taxation, allowed the defendant the costs of the cause. A rule nisi was obtained for reviewing the taxation.

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 WOOLLEY
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Wilde, Serjt., shewed cause, and contended, that although, in general, an executor might not be liable to pay costs, the wilful negligence of the plaintiff in the present instance deprived him of that privilege. He cited *Shaw v. Mansfield* (a), and *Nunex v. Modigliani* (b).

Bompas, Serjt., supported the rule, and cited *Booth and Others v. Wood* (c), *Hawes v. Saunders* (d), and *Harris v. Jones* (e).

TINDAL, C. J.—As the plaintiff in this case could only sue on the contract made with the testator, he would not have been liable to pay costs, if he were nonsuited at the trial. The statute of the 14 Geo. 2, c. 17, provides, “that all judgments given by virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force and effect;” and then it proceeds, “that the defendant or defendants shall, upon such judgment, be awarded his or their costs, in any action or suit where he, she, or they would, upon nonsuit, be entitled to the same, and in no other action or suit whatever.” By the clear language of the act, therefore, the defendant cannot be entitled to his costs of the cause. The present rule must be made absolute for the review of the Master’s taxation, such costs being allowed to the defendant as the wilful negligence of the plaintiff in not proceeding to trial has occasioned.

Rule absolute accordingly.

(a) 7 Price, 709.

(d) 3 Burr. 1584.

(b) 1 H. Black. 217.

(e) 3 Burr. 1451.

(c) 2 H. Black. 277.

END OF EASTER TERM.

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1833.

Trinity Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

KEYS v. SMITH.

The Court will waive the strict rule as to change of *venue* in favour of liberty.

IN this case the defendant had been arrested on a bill of exchange. The cause stood for trial at the last *Taunton* Assizes, and was made a special jury cause at the instance of the defendant. When it was called on, a sufficient number of special jurors did not appear, and neither party would pray a *tales*. It accordingly stood over. Afterwards, the defendant was rendered by his bail, and remained a prisoner in the *Fleet*. On an affidavit of these facts, a rule *nisi* was obtained for changing the *venue* from *Somersetshire* to *Middlesex*, on the terms of the defendant paying to the plaintiff the extra expense consequent on trying in *Middlesex* instead of *Somersetshire*, as all the plaintiff's witnesses resided in the latter county.

Wilde, Serjt., shewed cause, and submitted that the facts disclosed furnished no sufficient ground for departing from the general rule, with respect to changing *venue*.

Coleridge, Serjt., in support of the rule, contended that it would be exceedingly hard upon the defendant to be detained until the next *Taunton* Assizes, on a demand which might turn out to be unfounded, when no disadvantage could accrue to the plaintiff from the present rule being made absolute, since all the extraordinary expenses to which he could be put would be defrayed by the defendant.

The Court was of opinion, that, under the peculiar cir-

circumstances of the case, they might deviate from the strict practice of the Court, and grant the present application.

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v.
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Rule absolute accordingly.

ISAAC v. SPILSBURY.

THIS was a sheriff's rule under the Interpleader Act, (1 & 2 W. 4, c. 58, s. 6). It appeared that the sheriff seized goods under a *fi. fa.*, and the defendant's wife laid claim to them, on the ground that they were vested in certain trustees to her separate use. Soon after the defendant petitioned the Insolvent Court for his discharge. On the appearance-day to the rule, the trustees of the defendant's wife disclaimed any intention to interfere, and no one appeared on the part of the provisional assignee.

In order to induce the Court to interfere under the Interpleader Act in favour of the sheriff, an actual claim to the property seized must be made.

Per Curiam.—The facts of this case do not bring it within the 1 & 2 W. 4, c. 58. In order to bring it within that act, a claim must be made to the property. Here, however, no claim is really made; but the sheriff, being alarmed, calls upon persons to come before the Court and make claims. Such a case is not within the act, and, therefore, all we can do is to discharge the rule.

Rule discharged.

A week's time was given to the sheriff, in order to sell the goods and return the proceeds.

REGULÆ GENERALES.

IT IS DECLARED AND ORDERED, That, in all cases in which a defendant shall have been or shall be detained in prison

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REG. GEN.

on any writ of *capias* or detainer, under the statute 2 W 4, c. 39, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render, and notice thereof otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute, 2 W. 4, c. 39, schedule No. 2; unless further time to declare shall have been given to such plaintiff by rule of Court, or order of a Judge.

T. DENMAN.

N. C. TINDAL.

LYNDHURST.

J. BAYLEY.

J. A. PARK.

J. LITTLEDALE.

S. GASELEE.

J. VAUGHAN.

J. PARKE.

W. BOLLAND.

J. B. BOSANQUET.

W. E. TAUNTON.

E. H. ALDERSON.

J. PATTESON.

J. GURNEY.

IT IS ORDERED, That, from the present day, in all actions against prisoners in the custody of the Marshal of the *Marshalsea*, or of the Warden of the *Fleet*, or of the Sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

(Signed by all the Judges).

END OF TRINITY TERM.

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

COURT OF EXCHEQUER.

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

BOWEN *v.* BRAMIDGE.

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THIS was an issue (arising out of the motion in *Bramidge v. Adshead*) (a), which was directed by the Court to be tried to determine the right to certain goods taken in execution by *Bramidge*. A verdict having been found in favour of *Bowen*, *R. V. Richards* obtained a rule *nisi* calling on the defendant to shew cause why the sum of 111. 4s. should not be paid out of Court to the plaintiff, and why he should not have his costs of the action of trover and of this application.

Where an issue is tried by direction of the Court, under the Interpleader Act, the unsuccessful party is liable for the costs.

A party who applies to the Court by motion, without having made application to the opposite party to do what the rule calls on him to do, is not entitled to the costs of the rule, if

Talfourd, Serjt., shewed cause.—He said, that, if the Court put such a construction upon the act that the party

the opposite party, on shewing cause, confines himself to the question of costs.

(a) *Ante*, p. 59.

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BOWEN
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who fails is to pay all the costs, it would bear very hard upon his client, but he could not oppose the present motion: he objected also to the payment of the costs of this rule, because there had been no previous application to the defendant.

R. V. Richards, contra, contended that he was entitled to the costs of the rule, as he could not have got the money out of Court without a motion; and that, unless it was to be an universal rule that no party can have costs unless there has been a previous application, he was entitled to have this rule made absolute with costs.

BAYLEY, B.—I think the party who succeeds is entitled to the costs of the action, and that the party who fails must pay them; but, as to the costs of this rule, I think the plaintiff is not entitled to them, no previous application having been made to the defendant. If he had been applied to by *Bowen* to pay him the costs of the action, this application would probably have been unnecessary. No opposition has been made, except to that part of the rule which prayed for costs.

VAUGHAN, B.—All the costs ought naturally to fall on the party who fails. The Interpleader Act was intended to be in aid of sheriffs; and it is not because a particular case of hardship happens that the act is to be called a bad act.

Rule absolute, without costs.

1833.

WATSON v. ABBOTT.

THIS was an action for running down a ship. The issue in this action was tried in the sheriff's court by virtue of a writ of trial issued under the 3 & 4 Will. 4, c. 42, s. 17. Upon the trial the plaintiff was nonsuited. A rule *nisi* for setting aside the nonsuit having been obtained by *Hill*, on the ground of misdirection by the learned secondary,

The act authorizing the sheriff to try issues where the debt or demand does not exceed 20*l.* applies only to debts and pecuniary demands, and not to torts. *Seemle*, that the sheriff or his deputy has the power to nonsuit.

Petersdorff shewed cause.—The secondary has the power to nonsuit.

BAYLEY, B.—I have no doubt that the secondary had power to nonsuit, for he is put in the situation of a Judge at *Nisi Prius* (a); but had he power to try such a question as this?

Petersdorff.—The order was obtained by the plaintiff.

BAYLEY, B.—You cannot insist that this is within the act. The proceedings are *coram non judice*. The act only extends to debts and pecuniary demands.

VAUGHAN, B.—The words of the act are, “any debt or demand where the sum sought to be recovered *and indorsed on the writ of summons* shall not exceed 20*l.*,” &c. There could have been no debt here indorsed on the writ.

Rule absolute for setting aside the nonsuit.

(a) This point was made by *Lyndhurst* and the rest of the *Hill* in moving for the rule *nisi*, Court appearing to be against but abandoned by him, Lord him.

1833.

WARREN v. SMITH.

Service of a rule nisi to compute on the mother of the defendant, at his residence, held sufficient.

FOLLETT, in moving to make absolute a rule to compute, said that there was some doubt about the sufficiency of the service. The affidavit merely stated that the rule nisi was served by leaving it with the mother of the defendant, at his residence.

Per curiam.—That is sufficient.

Rule absolute.

PREEDY v. MACFARLANE.

Judgment as in case of a nonsuit cannot be moved for in the term for which notice of trial had been given.

PRICE moved for judgment as in case of a nonsuit, issue having been joined last term, and notice of trial given for the first Sittings in this term; but the cause had not been set down.

VAUGHAN, B.—You cannot move in the same term in which default was made.

BAYLEY, B.—I am of the same opinion.

Rule refused.

PLATT v. GREENE.

It is a question for the discretion of the Master, whether a witness ought to be allowed for the whole time of his attendance at the assizes, or only a portion of it; but, where the Master has decided upon it, the Court will not review his decision.

MILNER shewed cause against a rule which had been obtained by *Wightman* for referring a bill of costs back to the Master. The cause was tried at the last *Lancaster* Assizes: the commission-day being *Monday*, and business

at the assizes, or only a portion of it; but, where the Master has decided upon it, the Court will not review his decision.

beginning on *Tuesday* morning. This cause stood 70 in the third list, and was not tried till *Saturday* evening, when the plaintiff got a verdict. The objection was to the allowance which had been made to the witnesses for their time. One was an attorney, and a material witness; he had been allowed eight days; others had been allowed nine days; some not so much. *Wightman* objected to this allowance, as the attorney must have known he would not be wanted at the beginning of the week. It appeared, however, that the objection had been taken before the Master, and he had decided upon it; and that the attorney had been written to by the plaintiff's agent on *Saturday*, directing him to be at *Lancaster* on the *Monday* morning, and that the defendant's witnesses were also in attendance on the *Monday*, and that the first list of causes had gone off very rapidly: these circumstances had been taken into consideration by the Master.

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 PLATT
 v.
 GREENE.

LORD LYNDHURST, C. B.—If the parties acted *bonâ fide*, there is no ground for reviewing the discretion of the Master, though it may be true that other persons might have formed a different opinion as to the necessity of the witnesses attending so early.

BAYLEY, B.—It is a question for the Master, whether the witnesses ought to have attended on the first day; and he has decided upon it.

Rule discharged without costs.

DOE d. ——— v. BARKER.

HUMFREY moved for an attachment against the defendant, *Sarah Barker*, for non-payment of costs. The costs were taxed upon the rule for not confessing lease, entry, &c., and there was an affidavit of the Master's *allocatur*, and of a personal service on the defendant, and

An attachment for costs is now grantable without first issuing a subpoena.

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DOE
d.
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BARKER.

a demand of the costs; but there was a doubt, whether, in this Court, it was still necessary to issue a *subpæna* for the costs, and have an affidavit of the personal service of it (a).

BAYLEY, B.—The old course certainly was, to take out a *subpæna*; but it does not appear to be necessary now. There must be a demand of the costs in every case; but hitherto that has been accompanied by a *subpæna*. I think we may consider it unnecessary.

Rule granted.

(a) See the form and practice, Burton's Exch. Vol. 2, p. 522.

SMITH v. CLARKE.

Interlocutory judgment cannot be set aside because the notice of declaration is irregular. Where a rule is drawn up for setting aside a judgment for irregularity, an objection that it

ARCHBOLD shewed cause against a rule which had been obtained by *Miller*, for setting aside the interlocutory judgment, (which had been signed in this action), with costs, for irregularity. The notice of declaration was headed "In the King's Bench," and gave notice of a declaration filed in the office of Pleas. He contended that the defendant could not be misled by it; and that he should

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BIDDELL v. SMITH.

THE venue in this action having been changed, on the usual affidavit that the plaintiff's cause of action, if any, arose in *Staffordshire*, and not elsewhere, *Humfrey* moved to discharge the rule for changing the venue, on the ground that the affidavit was made by the attorney in the cause, and not by the defendant himself. He contended, that an attorney had no power to make such an affidavit; he said, the Masters knew of no instance of its having been done.

It is not of itself a sufficient objection to an affidavit for changing the venue, that it is made by the attorney in the cause, and not by the defendant; but, *semble*, that, if defendant is in the country, it ought to be made by him.

BAYLEY, B.—There is no rule that such an affidavit must be made by the defendant in the cause, and not by the attorney; perhaps the defendant is not in the country. If it is found, however, that the defendant is in the country, you may take a rule (a).

(a) See *King v. Turner*, 1 Chit. Rep. 58, and cases in note (a); and *Brown v. Davis*, Id. 161.

KIRBY v. ELLISON.

THIS action having been commenced for a debt of 5*l.* 16*s.*, *Bolland, B.*, on the application of the defendant's attorney, made an order, on the 9th of *July*, that proceedings should be stayed on payment of debt and costs by the defendant, by monthly instalments of 1*l.* The plaintiff's attorney however objected, and the order being made without his consent, he treated it as a nullity, and delivered a declaration; but, upon application to *Vaughan, B.*, on *July* 18th, he made an order for setting aside the declaration, with costs. The defendant's attorney


A Judge at chambers, who stays proceedings on payment of debt and costs, cannot, without the plaintiff's consent, allow the defendant longer time for the payment than he would be entitled to by law.

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paid the instalments regularly (out of his own pocket, as it was sworn) till the present term, the plaintiff receiving them, subject to his right to apply to the Court to set aside the above orders. The defendant's attorney then applied for the costs on Mr. Baron *Vaughan's* order, amounting to 10*l.*, but which were afterwards taxed at 5*l.* 3*s.* To get rid of these costs, *Chilton*, on behalf of the plaintiff, obtained a rule *nisi* to set aside the above orders, contending that the learned Baron had no authority to make the first order, and that the plaintiff was therefore justified in proceeding.

Platt shewed cause.—He contended, that if a Judge had power to stay proceedings on payment of debt and costs, he could also order in what way they should be paid. An order to pay on the *Saturday* following would have been clearly good; and he had as much authority to allow a month as a day. Here, money was paid to the plaintiff at an earlier period than if he had gone on in the regular way to judgment; and if there was any default, execution was to issue for the whole; but—

BAYLEY, B., expressing his opinion, that, though a Judge might have power to give the time allowed by law.



1833.

KING v. MONKHOUSE.

THIS was a motion to set aside a writ of *capias*, on account of the indorsement not complying with the terms of the Uniformity of Process Act. The writ was indorsed thus—"This writ was issued in person by *W. H. King*, who resides at 7, *Gray's Inn Square, London*." In the affidavit of debt it was called *Gray's Inn Square, Middlesex*. *Mansel* contended that the description of the place of abode was not correct. He produced an affidavit that *Gray's Inn Square* was not in *London* but in *Middlesex*: the description should have been *Gray's Inn Square, Gray's Inn*, that being the larger district; and he referred to *Engleheart v. Eyre* (a), where *Patteson* intimated that "*Gray's Inn, London*," put as the residence of an individual (not an attorney) would not be sufficient.

"*Gray's Inn Square, London*," held a good description in a writ of the residence of the plaintiff, an attorney, within the Uniformity of Process Act, though it was sworn that *Gray's Inn* was not in *London*.

Hutchinson, contrà.—*Gray's Inn* is an extra-parochial district, and the description we have given is the best that can be given. Letters are always addressed to *Gray's Inn, London*.

BAYLEY, B.—The act (b) directs, that when the writ is sued out by the plaintiff in person, there must be a memorandum expressing that it is so sued out; and it must also mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be. The plaintiff now resides in a place which is not within any city, town, parish, or hamlet, and he has given as good a description of his residence as he could. The rule must therefore be discharged.

Rule discharged.

(a) *Ante*, 145.

(b) 2 Will. 4, c. 39, s. 12.

1833.

PHILBY v. CHARLES IKEY.

Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and, upon a rule being obtained under the Interpleader Act, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff, but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to shew cause.

AN execution having issued against the goods of the defendant, the sheriff, on executing the writ, received from the defendant a written notice, that the goods seized were the property of *William Ikey*, and not of the defendant. The sheriff thereupon obtained a rule *nisi*, under the Interpleader Act (*a*), and served it upon *William Ikey* and the defendant; but neither *Charles* nor *William Ikey* appeared to shew cause.

Clarkson, for the sheriff, asked for a rule to bar the claim of *William Ikey*; and that *Charles* might pay the costs of this application.

Hutchinson, for the plaintiff, contended that his costs ought to be paid by the sheriff.

BAYLEY, B.—The plaintiff is not in fault, nor is the sheriff. He was forced to come here; and I think he has been brought here improperly. The rule must be absolute as to barring all claim of *William Ikey*; and, as to the rest, it must be enlarged, and made part of the en-

1833.

PITT v. EVANS.

THE plaintiff was taken in execution for costs as he was coming to attend the trial of this cause at *Nisi Prius*, and after being in custody some days he deposited the money. He now applied for relief, and that the Court would order the money to be returned. The process was issued from the *King's Bench*.

LORD LYNDHURST, C. B.—The application must be made to the Court of *King's Bench*.

BAYLEY, B.—It is the privilege of the Court at *Nisi Prius* to protect its suitors. The plaintiff should have applied either to the Judge at *Nisi Prius*, or to the Court out of which the process issued.

Rule refused (a).

(a) *Jacob v. Rule*, ante, Vol. 1, p. 349.

SMITH v. CURTIS.

FISH moved to stay the proceedings in this action, and that the plaintiff should pay the costs, under these circumstances:—The plaintiff some time since had been indebted to the defendant in 10*l.*; the latter, being unable to obtain payment, purchased from the plaintiff coals to the amount of 50*s.*, and afterwards summoned the plaintiff to a 40*s.* local court for the residue of the debt: both parties attended, and the plaintiff said he had a cross-demand for 50*s.* for the coals; the commissioners awarded, that, on the balance of accounts, there was a debt due from the plaintiff to the defendant, of 1*l.* 19*s.* 11½*d.* The present ac-

Where a party to a cause is arrested upon process out of another Court, while attending at *Nisi Prius* in expectation of its coming on, he must apply for relief to the Judge at *Nisi Prius*, or to the Court out of which the process issues, and not to the Court in which the cause is.

The Court will not stay proceedings in an action for a debt, though it clearly appears by affidavit that there is no debt due.

1833.

SMITH
v.
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tion was commenced for the same 50*s.* which had been allowed to the plaintiff in account.

BAYLEY, B.—This is a case in which we would interfere if we could; but we cannot do so.

Rule refused.

SUMMERS v. GROSVENOR.

Where the sum for which the defendant is arrested bears no proportion to the sum which is ultimately recovered, not being reduced by a set-off, it shews such a *prima facie* case of want of reasonable or probable cause for the arrest as is sufficient to call on the plaintiff to shew that he had a reasonable or probable

TALFOURD, Serjt., obtained a rule *nisi*, calling on the plaintiff to shew cause why the defendant should not have his costs of suit under the 43 Geo. 3, c. 46, s. 3, having been arrested for 33*l.* 8*s.* 9*d.*, and the arbitrator having awarded only 3*l.* 9*s.*

Ludlow, Serjt., shewed cause.—He contended that there was no ground laid for the application; and that it had never been decided that the mere recovery of a less sum, without other circumstances, entitled the defendant to move under that act. The defendant kept a public-house, and was also a driver of a stage-coach, and the action was brought for the amount of goods sold and delivered, and

BAYLEY, B.—It is not shewn that the 33*l.* was reduced by a set-off, under the plea of set-off. The defendant swears that the plaintiff said he would arrest the defendant, and that he believes the plaintiff had no reasonable or probable cause for the arrest. The defendant must shew that there was a want of reasonable or probable cause. He was arrested here for 33*l.*; the sum recovered was only 3*l.* 9*s.* The plaintiff must have known on what grounds he arrested the defendant; he does not shew how the defendant was indebted to him in 33*l.* He neither states the items of the account nor the evidence he adduced; he does not shew whether he had reasonable or probable cause.

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SUMMERS
v.
GROSVENOR.

The other Barons concurred.

Rule absolute.

SMITH and Others v. HILL.

PRENDERGAST moved for a *distringas*.—The answers given were, that the defendant was out of town; and, on one occasion, the woman who answered the door, who was sworn to be either the wife or servant of the defendant, said, that she was authorized to say that the defendant was out of town.

If, upon calling to serve a writ of summons, the answer given is that the defendant is out of town, it must be shewn to the Court, that, from inquiries made, there is reason to believe that the answer is false.

BAYLEY, B.—When the answer given is that the defendant is out of town, inquiries ought to be made in the neighbourhood to learn whether any persons have seen him about. In the present instance I think it may be collected, from the answer given by the woman, that the defendant had been in town.

Rule granted.

1833.

PITT v. EVANS. SAME v. JERVIS.

A motion on behalf of the same plaintiff in two different actions, upon the same ground of application, may be made upon one affidavit intituled in both actions.

A plaintiff who was under a peremptory undertaking to pay, but was prevented attending in person to pay, by being arrested, was allowed to set aside the peremptory rule for judgment as in case of a nonsuit, on payment of costs.

THE plaintiff *Pitt* obtained a rule *nisi* for discharging a rule for judgment as in case of a nonsuit. He had before given a peremptory undertaking to try, and, having again made a default, the rule for judgment as in case of a nonsuit had been made absolute in the first instance. The ground of the motion was, that he had been arrested after he had attended the Court for several days, and in consequence of his not having been in attendance when the cause was called on it was struck out of the paper.

Kelly shewed cause in the first action.—He objected, in the first instance, to the affidavit on which the rule was moved being improperly intituled in both causes, instead of there being two affidavits intituled in each.

BAYLEY, B.—I think where there are several causes it is usual to have one affidavit: there is the same ground of application in both.

Kelly.—There is no ground laid for this application. The cause was struck out because no one was in attend-

1833.

Ex parte —.

BARSTOW, four days before the end of the term, moved for a rule to shew cause why an attorney should not deliver his bill of costs to be taxed as between party and party, and why he should not answer the matters of an affidavit. Eight writs had been sued out against the defendant by different persons, who all employed the same attorney: a Judge had made an order that he should shew his retainer, but he had not done so.

A rule calling on an attorney to answer the matters of an affidavit cannot be moved for four days before the end of the term; neither can cause be shewn against such a rule on the last day of term.

Lord LYNDHURST, C. B.—It is too late now to have a rule calling on the attorney to answer the matters of the affidavit: cause cannot be shewn on the last day of term. You may move on the first day of next term, if you think fit, and you may now have a rule *nisi* as to the other part of your application.

CLARKE v. LORD.

THE Court, in this case, having ordered certain rent to be paid over by the sheriff to *Hodges*, the landlord, upon his giving security, the question was, whether the sheriff was liable to pay the costs of the security (a).

Cresswell contended, that, *Hodges* having been allowed his costs, because he had been brought into Court improperly, he ought to be allowed the expense of giving security, as part of the costs.

The sheriff having taken goods in execution while there was rent due to the landlord, which he claimed of the sheriff, the latter brought the landlord, with other claimants, into Court under the Interpleader Act; the Court ordered the sheriff to pay

the rent, upon the landlord's giving security, and also to pay his costs:—*Held*, that the sheriff was liable to pay the expense of the security.

(a) See *ante*, p. 55, S. C.

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*Platt, contrà.*CLARKE
v.
LORD.

BAYLEY, B.—The sheriff comes to ask a favour; I think he must pay these costs.

MARSHAL v. FORSTER.

Issue was joined in *Trinity* Term, and notice of trial given for the second Sittings in *Michaelmas* Term, but countermanded in proper time; the defendant then moved for judgment as in case of a nonsuit, there being time in the term to give notice for the Sittings after term:—*Held*, too soon.

MANSEL moved for judgment as in case of a nonsuit, issue having been joined last term, and notice of trial given for the second Sittings in this term, (which would be to-morrow): it had, however, been countermanded in proper time: the record had not been entered. The venue was laid in *London*, and the defendant was in time to give notice of trial for the Sittings after term. He cited *Isaac v. Goodman* (a).

BAYLEY, B.—I think you are too soon.

Rule refused.

(a) *Ante*, p. 34.

was delivered. The plea was left at the plaintiff's attorney's office, and received and not returned; nor was any notice given that there was an objection to the plea on account of the time at which it was delivered. The plaintiff waited till the 16th of *July*, and then signed judgment. *Wightman* now contended, that, by the rule of *Michaelmas* Term, 1 *Will.* 4, reg. 9, requiring all proceedings to be served before nine o'clock, the plaintiff was at liberty to treat the plea which was delivered after that hour as a nullity; and that he had so treated it and signed judgment.

1833.
HORSLEY
v.
PURDON.

Per Curiam.—We think in this case there ought to be no rule. The conduct of the plaintiff's attorney is calculated to delude the defendant. The attorney's office is open, and the plea is delivered there at half past nine, and no objection made. The defendant had the same time for pleading after oyer had been granted as he had before it was demanded. There was time, therefore, for the defendant to have delivered the plea afresh if he had been aware of the objection, and the plaintiff was not entitled to treat it as a nullity.

Rule refused.

FRITH'S Bail.

THE notice of bail (which was to put in and justify at the same time) was given on the 5th for the 8th. *John Jervis* objected, that it should have been a four days' notice; and if, on account of the defendant's being in prison, two days were sufficient, the notice ought to have expressed that he was a prisoner. He cited *Creighton's* Bail (a), as expressly in point.

It is sufficient if the notice of bail given by a prisoner is signed by him as being "in custody," though it does not state in the usual way that he is a prisoner.

Ball, contra, said, that the notice was signed—"defen-

(a) 1 Dowl. P. C. 609.

1833.
FRITH'S Bail.

dant in person, *in custody*," and contended, therefore, that it sufficiently appeared that the defendant was a prisoner.

GURNEY, B.—The proper way is to state it in the body of the notice ; but I think it sufficiently appears from the whole of the affidavit that the defendant is a prisoner.

Ex parte LAURENCE.

Where a client obtained an order that his attornies should deliver him an account of all monies received on his behalf, and they accordingly deliver an account, the Court refused to grant an attachment against them upon affidavits impeaching the correctness of the account.

A JUDGE'S order had been obtained that certain attornies should deliver to their client, *Laurence*, an account of all monies received on his behalf in respect of a certain action and otherwise. The order had been made a rule of Court. The defendant accordingly delivered an account.

Heaton now moved for an attachment against the attornies for not obeying the rule of Court, and also for the costs of making the Judge's order a rule of Court. His affidavit stated that they had received a sum of 13*l.* 8*s.* for costs on one occasion, for which they had not given

BAYLEY, B.—A party cannot apply for an attachment for disobedience of a Judge's order without making it a rule of Court. The party who does so ought to pay the costs of it; and he is not entitled to throw that expense on the other side. You cannot have an attachment for not treating a Judge's order with proper respect.

1833.

Ex parte
LAURENCE.

Rule refused.

SMITH v. SPURR.

MANNING moved to make a rule absolute on affidavit of service. The defendant was an attorney, and the affidavit shewed the service to be by leaving it with a male servant in the employ of the laundress at the office of the defendant.

Service of a rule nisi at the office of an attorney, by leaving it with the laundress's servant, held insufficient.

BAYLEY, B.—That will not do: on the laundress it would have done, but not on the laundress' servant: we may fritter away all rules.

Rule refused.

RICE v. HUXLEY.

THIS was a rule which had been obtained by *Humfrey* for setting aside the writ of *capias*, (under which the defendant had been arrested), with costs, for irregularity. There were several grounds of objection, one of which was, that the residence of the defendant was not inserted in the writ.

If the place of residence of the defendant is not inserted in the writ of *capias*, it may be set aside at the instance of the defendant, though his residence is stated in the copy of the writ.

Knowles shewed cause.—On the copy of the process the defendant's residence is given—" *Thomas Huxley, Whitehall-yard.*" It is sufficient for all purposes if it is in the copy without being also in the original: it cannot be of

1833.
RICE
v.
HUXLEY.

any advantage to the defendant: it is only for the guidance of the sheriff, who has succeeded in taking the right individual. There was a former rule (a), which required the defendant's place of abode to be inserted in the writ; but, in the case of *Clarke v. Palmer* (b), Lord Tenterden observed that the rule contained no words of avoidance; and that he would by no means lay it down as a general proposition, that where a writ has been lodged by the sheriff without the indorsement required by the rule of Court, and the sheriff has received the writ without objection, the Court will interfere and set aside the writ." That was a motion on behalf of the sheriff; but no case has decided that such an objection may be taken by the defendant. By the rule of Court of *Michaelmas* Term, 3 *Will.* 4(c), it is ordered, that, if there is an omission in the writ of any matter required by the act, the writ shall not on that account be held void, but may be set aside as irregular upon motion. It is discretionary in the Court, therefore, whether they will countenance such an objection, and unless the defendant is prejudiced the Court will not entertain it.

Lord LYNTHURST, C. B.—There are certain forms pre-

1833.

The KING v. PRICE and Another.

THE defendants, who are attornies, having delivered to their clients a bill for business done by them, the client took out a summons for taxing the bill, and a Judge made an order that the attornies should deliver a particular of all sums received by them on account of their clients. The order was made on the 22nd of *July*, 1833, and in *August* it was made a rule of Court. The rule of Court was dated the last day of the previous *Trinity* Term, (*June* 12th), and having been duly served and disobeyed, *Heaton*, on the first day of this term, applied for an attachment for disobedience of the rule of Court.

Where a Judge's order is obtained in vacation, it cannot be made a rule of Court till the following term.

The Court observed that there was an apparent incongruity in granting an attachment on a rule of Court made in *June*, when the order was not obtained till *July* following.

Heaton said he believed it had been customary to do so. The case stood over; and, on a subsequent day, *Bayley*, B. refused to grant the attachment: he said he had consulted the other Judges, and they were of opinion that such a practice, if it had existed, ought not to be continued.

Rule refused (a).

(a) See Reg. Gen. M. T. 3 W. 4, r. 13.

1833.

SIBLEY *v.* LEICESTER.

An attorney has no right as against his client to retain money in his hands which he has received as attorney for his client, even though it should be the proceeds of an execution against the goods of a defendant who objects to the amount levied, and who has a rule then pending before the Master, calling on the plaintiff or his attorney to refund part of the money.

IN *Michaelmas* Term, 1831, the present plaintiff commenced an action in the *King's Bench*, on a bill of exchange, against *Tippet*, who gave a *cognovit* for the debt. In *April*, 1833, the plaintiff issued execution for the balance due, and costs, amounting to 46*l.* 10*s.* *Tippet* objected to the amount levied; and in *Easter* Term obtained a rule, calling on *Sibley*, or *Leicester*, his attorney, to shew cause why part of the money paid by the defendant (*Tippet*) should not be refunded. That rule was enlarged to *Trinity* Term, and ultimately referred to the Master, but no appointment had been made upon that reference. The plaintiff claimed from *Leicester*, the present defendant, and who was the attorney for the plaintiff in the action against *Tippet*, a sum of 18*l.* 10*s.*, as the balance due to him; but *Leicester* refused to pay it over, or to account, and the plaintiff thereupon commenced the present action in this Court.

Wordsworth, on behalf of the defendant *Leicester*, moved that the proceedings in this action might be stayed

BAYLEY, B.—The rule can only be made absolute on the terms of bringing the money into Court.

1833.

SIBLEY
v.
LEICESTER.

Humfrey and *Wordsworth*, in support of the rule, contended that this action could not be maintained, and that it was a contempt of Court to bring it. The action is premature, until the Master has decided what sum ought to be repaid to *Tippet*.

BAYLEY, B.—*Leicester* received this money as agent for *Sibley*; *Sibley*, therefore, would be the person answerable for the wrongful levy. It was no part of the rule that *Leicester* should pay the money. The rule, therefore, can only be absolute on *Leicester* bringing in the money in a week.

Rule absolute, without costs, on the defendant bringing in the money in a week; and if not, the plaintiff to be at liberty to try after the term.

DARLING v. GURNEY.

THIS was a proceeding against bail, and came on for argument on the last day of last term, upon demurrer, when it was contended that the plaintiff had improperly sued by bill, and the Court gave judgment for the defendant (a). The Court having some doubts as to the propriety of the former decision, it was ordered to be set down again for argument in this term.

It is not a ground of general demurrer, that the plaintiff, in an action against bail, is stated to have brought a bill into Court, if upon the whole record it appears to be a proceeding by *scire facias*.

Archbold accordingly re-argued his former objection, that it was a proceeding by bill, and that the Court had now

(a) See *ante*, p. 101.

1833.
DARLING
v.
GURNEY.

no jurisdiction by bill; and that there could be no bill in *scire facias*, the declaration being merely an entry of the writs of *sci. fa.*, and that the statement of the proceeding by bill could not be rejected as surplusage.

Busby, contra, contended that such an objection could not be taken on general demurrer.

BAYLEY, B.—Upon looking at the whole of the record, it now clearly appears to me that the statement of the complaint by bill, at the commencement of the declaration, is impertinent. Where the plaintiff says he brought in a *bill in these words*, and the Court see, from reading it, that it is not a bill, they may hold it to be surplusage; and if that passage is omitted, the declaration is then free from objection. I do not say that it might not have been taken advantage of on special demurrer. Looking at the commencement of the declaration, it appeared to me to be totally at variance with the subsequent statement; but upon the whole there appears sufficient to shew that it is a proceeding in *scire facias*, and not by bill.

Lord LYNCHURST, C. B.—The averment as to the bill



1833.

SOPER v. CURTIS.

THIS was an action of trespass for pulling down a house. The declaration was delivered on *July* the 22nd. The plaintiff was too late to try at the last *Hampshire* Assizes; and the defendant, wanting time to plead, had three months' time given him by the plaintiff. It was sworn by the defendant's attorney, that he thought they were to be reckoned as calendar months; and within three calendar months, but after three lunar months, he pleaded several special pleas: in the mean time judgment had been signed. This was a motion to set aside the interlocutory judgment, on payment of costs, under the above circumstances. The Court made the rule absolute upon the terms of paying the costs occasioned by the mistake.

Where three months' time to plead are given generally, they are to be reckoned by lunar months, and not calendar months.

Coleridge, Serjt., for the defendant.

Dampier, for the plaintiff.

Rule absolute, on payment of costs.

BLOOMFIELD v. BLAKE, COHEN, and Others.

THIS was an action of trover against the four defendants, to recover a quantity of jewellery, and a verdict was given against all, subject to be reduced to one shilling, upon the property being delivered up. *Coleridge*, Serjt., on behalf of the defendant *Cohen*, obtained a rule *nisi*, for entering a *nolle prosequi* as to him, on the ground that *Cohen* had been told before the trial that no evidence would be offered against him, as he would be wanted as a

Where an action was brought against several defendants, and a verdict taken against all, though it had been agreed that no evidence should be given against one of them, the Court ordered a *nolle prosequi* to be entered as to

him, though the assignee of the plaintiff, who had since become an insolvent, objected.

1833.
BLOOMFIELD
v.
BLAKE.

witness for the plaintiff; and, in consequence, he had attended as a witness, and had not delivered any brief.

C. Jones shewed cause on behalf of the assignee of the plaintiff who had since become insolvent. He stated, that the plaintiff and *Cohen* were now living together, and that it was a collusion between them to keep possession of the property, and deprive the attorney of his lien.

Coleridge, Serjt.—The verdict was by consent. The assignment was between the verdict and judgment, and there is nothing in the Insolvent Act to vest the property in the assignee.

Per Curiam.—The assignee is bound by the same equities as the plaintiff: the agreement between the plaintiff and *Cohen* is not denied, and it was therefore a fraud on the part of the plaintiff to take a verdict against him.

Rule absolute.

tried before the sheriff, as at the Sittings; but I think you are too soon to apply in the same term.

1833.

REGIN
v.
GREENVILLE.

GURNEY, B.—It ought to appear that they countermanded their notice.

Rule refused.

BRITTEN v. BRITTEN and Others.

THIS was an action on a deed for non-payment of rent. The defendant pleaded, that the plaintiff was suing as trustee for *Britten*, who had become bankrupt, and that the rent had been paid to the assignees. The plaintiff demurred. The joinder in demurrer was on *Monday*, the 18th of *November*; and, on the same day, *Mansel* obtained a rule for a *concilium* for *Wednesday*, the 20th of *November*, treating the plea as pleaded for delay, being only a defence in equity, and not being pleaded by way of satisfaction. On the 20th, *Mansel* applied for judgment; but *Erle*, for the defendant, objected that he had not been allowed sufficient time, the *concilium* not having been served till nine o'clock on *Monday* night, and no demurrer books had been delivered. *Mansel* answered, that the plaintiff's demurrer books had been delivered, and that the *concilium* had been served as soon as possible; and he submitted, that the defendant had waived any objection by appearing. As the plea was only pleaded for delay, the Court would, he hoped, name another day.

Where the *concilium* is served so late that the opposite party has not time to prepare and deliver the demurrer books two days before the day for argument, the Court will not allow the demurrer to be argued, though it is stated to be a plea pleaded for delay; and the defendant will be entitled to his costs for appearing to make the objection.

BAYLEY, B.—There is no other paper day in this term. The demurrer books were only delivered last night instead of the previous evening; the defendant had no opportunity of delivering his demurrer books on *Monday*: I therefore think the defendant ought to have his costs of coming here.

1833.

BRITTEN
v.
BRITTEN.

Lord LYNDHURST, C. B.—The defendant was obliged to appear here to protect himself.

HAYTHORN v. BUSH.

In an action on a bill of exchange, the defendant is too late to change the venue after an order for time on the usual terms and an undertaking to try at the Sittings, though it is sworn that all the witnesses reside in the county to which the venue is required to be moved.

THIS was an action on a bill of exchange.—*Carrington* had obtained a rule *nisi* to change the venue from *Middlesex* to *Gloucestershire*, upon an affidavit that all the witnesses resided in the latter county, and that there was a good defence on the merits.

Whitmore shewed cause.—He objected that the application came too late, as the defendant had obtained a week's time to plead on the usual terms, the defendant undertaking to try at the Sittings in or after *Michaelmas* Term.

Per Curiam.—The motion is too late after such an order

Rule discharged.

a *debt*; the declaration was filed on the 29th of *October*. The objection appeared on the face of the writ, but the application to set aside proceedings was not made till *November 2nd*; they have, therefore, waived any objection to the writ, and are now too late to set it aside: it clearly appeared it was a money demand, and a declaration in *assumpsit* was regular. The motion ought at least to have been confined to setting aside the declaration.

1833.
 EDWARDS
 v.
 DIGNAM.

BAYLEY, B.—The writ might have been objected to, but it was not. When the declaration was filed, a variance appeared between it and the writ: that appears to me to be an objection, both to the declaration and writ.

The other Barons concurred.

Rule absolute.

ELLISTON *v.* ROBINSON.

J*USTICE* obtained a rule *nisi* to set aside the interlocutory judgment which had been signed in this case, with costs. The defendant had been served with a writ, indorsed for 20*l.* 1*s.* 6*d.* (and interest) debt, and 2*l.* 15*s.* costs, to which he appeared. When the declaration was delivered, the particulars of demand claimed only 12*l.* 1*s.* 6*d.* The affidavit stated, that, if the defendant had known that the real debt was only 12*l.* 1*s.* 6*d.*, he should not have entered an appearance, but paid the money.

If the plaintiff indorses on the writ a larger debt than is due, by which the defendant is misled, and prevented from settling the action, the Court will stay the proceedings, on payment of the real debt, with the costs of the writ only; but the application must be made promptly after the particulars are delivered.

J. Jervis shewed cause, upon an affidavit that the plaintiff held two bills of exchange accepted by the defendant, one for 20*l.* and another for 12*l.*; that the 12*l.* bill was the one on which the plaintiff was suing. But he contended that the application was too late. The appearance was on

1833.
ELLISTON
v.
ROBINSON.

August 26th, and the declaration was delivered on the 20th of *October*, with a rule to plead; since then, a plea has been demanded, judgment signed, and a rule given to compute. There was a mistake about the bills; and, if the defendant was misled, he should have given us some intimation of it, but he never did so. This application was not made till the 6th of *November*. The Court has no power to make this rule: a writ may be set aside, if not properly indorsed; but here the writ was properly indorsed with all the necessary particulars, and, if less was due, it might have been tendered. The effect of this motion to set aside all the proceedings will be to saddle the plaintiff with all the costs.

Justice, in support of the rule.—Judgment was not signed till the 5th of *November*. It is not sworn that there was a mistake about the bills. It is not even sworn that the 20*l.* bill is due; and 1*s.* 6*d.* is added for noting, not being recoverable. That made the debt above 20*l.*, and prevented an application to have the cause tried before the sheriff. The real debt ought to have been indorsed, otherwise the defendant may be misled, as he swears he was: he ought, therefore, to be relieved from all the costs, ex-

required by the act, such writ, &c. may be set aside as irregular, upon application to the Court, *or to any Judge.*" That rule recognises the right to apply to a Judge. Where proceedings are taken at the beginning of the long vacation, it might throw enormous expense on the other side if a party could lie by till term (*a*). The defendant ought to have applied in a reasonable time after declaration; as to that there is a rule (*b*), that no application to set aside proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after notice of the irregularity. The declaration was delivered on the 24th of October. The defendant was not bound to make inquiries before the declaration, though probably he would have learnt how it was; but after declaration, if he had promptly made an application to pay the debt and the costs of the writ, any Judge would have granted it. There were eight days before the term, during which he might have applied to a Judge: in term, eight days would have been full time to apply: the judgment was regularly signed on the 5th, and on the 6th this application is made, and, by that neglect, subsequent costs have been incurred. The utmost we can do is to make the rule absolute for paying the debt and costs hitherto incurred in a week; but as to the costs of the application, as no mistake is sworn to, I think the plaintiff should not have his costs. If the debt and costs are not paid within a week, judgment will then be signed, and this rule discharged, without costs.

1833.
 ELLISTON
 v.
 ROBINSON.

Rule accordingly.

(*a*) See *Cox v. Tullock*, *ante*, p. 47; and *Hughes v. Brand*, *Ib.* 132. (*b*) Reg. Gen. H. T. 2W. 4, s. 33, *ante*, Vol. 1, p. 187.

1833.

TURNER v. SHAW.

A *cognovit* given by a defendant against whom a writ had been issued, and who, from the conduct of the parties, was led to believe he was under duress, no attorney being present, was set aside, though it was positively denied that he was in custody, or that a warrant had been issued against him.

THIS was a rule calling upon the plaintiff to shew cause why the *cognovit* given in this action, and the interlocutory judgment and subsequent proceedings, should not be set aside with costs. The rule was obtained by *J. Jervis*, on the ground that the *cognovit* was given by the defendant whilst he was in custody and no attorney was present. *Humfrey* shewed cause.

It was denied, on the part of the plaintiff, that the defendant was in custody when he gave the *cognovit*; and it was positively sworn that no warrant had been ever issued for his arrest, but that he had been told a *capias* was issued against him, which would be executed unless the matter was settled. On the other hand, it was sworn that a writ was produced, and that some one had said to the defendant that he (the defendant) must go with him, and that there was laid on the table a paper partly written and partly printed, which he believed to be a warrant: this was also denied, on the other side, in this way—that no paper, either printed or written, was laid on the table.

BOLLAND, B.—There was a paper on the table, which

1833.

SELL v. CARTER.

STEER having obtained a rule *nisi*, at the end of *Trinity* Term, to set aside an award made between these parties, pursuant to an order of *Nisi Prius*, by which all matters in difference were referred on four grounds, (specified in the rule); and all the objections appearing on the face of the award—

A motion to set aside an award, made under an order of *Nisi Prius*, must be made within the first four days of the next term, though it is for objections apparent on the face of the award.

Platt and *Thesiger* now shewed cause, and made a preliminary objection that the motion was too late. The award was made in *Easter* Term, and the motion ought therefore to have been made within the first four days of *Trinity* Term.

Steer, in support of the motion, contended, that, according to *Pedley v. Goddard* (a), and *Manser v. Heaver* (b), the objections here, being apparent on the face of the award, could be taken advantage of at any time.

The Court (consisting of *Bayley*, B., *Bolland*, B., and *Gurney*, B.) held that the lateness of the application was a fatal objection, and they discharged the rule with costs.

(a) 7 T. R. 73.

(b) 3 Barn. & Adol. 295.

DOE v. HARE.

IN an action for mesne profits the plaintiff recovered only the taxed costs of the ejectment. *W. H. Watson* moved for a new trial on several grounds, one of which was, that he was entitled to recover the extra costs.

In an action for mesne profits, the plaintiff is entitled to receive only the taxed costs of the ejectment, and not the extra costs.

But, *per Bayley*, B.—The verdict at present is for taxed costs, and there is no authority to shew that you are entitled to recover more.

Rule refused.

1833.

AUST v. FENWICK.

Where a cause which stood thirty off was taken out of its turn, as undefended, in the absence of the defendant's attorney, who was casually absent, no notice having been given that it would be taken as an undefended cause, the Court set the verdict aside, and granted a new trial, the costs to abide the event.

THIS was an action on a bill of exchange by the drawer against the acceptor, and was tried at the last assizes for *Croydon* as an undefended cause.

Chambers obtained a rule *nisi* for setting aside the verdict, and having a new trial, on an affidavit which stated that the cause stood No. 64, in the cause list, on *Tuesday* the 6th of *August*, on which day it was tried as an undefended cause; but no notice had been given that it would be taken as undefended; that the defendant's attorney had attended daily for five days at the assizes, until *Tuesday* at twelve o'clock, when, in consequence of the dangerous illness of a relation, he returned to town, leaving the brief in the hands of an attorney, with instructions to deliver it to counsel, if it should be necessary; that the cause was then thirty off, and was taken out of its turn; that 10*l.* had been paid into Court, and a notice of set-off given, which was intended to be proved, and that a *subpœna* had been issued; and he gave as a reason for not delivering his brief sooner, that at the *Lent* Assizes he had delivered a brief to counsel, but the plaintiff then withdrew the record:

out of their turn; and that in the present case it had been repeatedly asked whether any gentleman was instructed, and, no one appearing to know any thing about the cause, it was taken as undefended. Circumstances were also sworn to, to shew that the defendant had no defence; but—

1833.
AUST
v.
FENWICK.

BAYLEY, B., said he could not go into that, as they could not try the cause on the merits.

LORD LYNTHURST, C. B.—Where there is merely a list for the day, as there is in *London*, every body is expected to be ready; but that cannot apply to the assizes, where there is a list of eighty or a hundred causes. It would be very hard if all parties were obliged to be prepared on the first day.

BAYLEY, B.—I think at the time the cause was taken the defendant was not bound to have delivered his brief. It is not negatived that the defendant's attorney was seen attending at the assizes. There ought to be a new trial, and the costs will abide the event.

Rule absolute for a new trial; and if the parties do not agree to refer, the trial to be in *London or Middlesex*.

REDIT v. LUCOCK.

BIGGS *Andrews* obtained a rule *nisi* for taxing the defendant's costs of the day, and that they should either

given notice of trial), on account of some supposed defence which it was intimated would be set up on the other side, but at the *Summer Assizes* obtained a verdict, and since then his costs had been taxed:—*Held*, that a motion for the costs of the day, for not trying at the *Spring Assizes*, was not too late in *Michaelmas Term* following.

Where a plaintiff withdrew his record at the *Spring Assizes*, (after having

1833.

REDIT

v.

LUCOCK

be paid by the plaintiff, or deducted and set off from his costs.

Kelly shewed cause.—This was an action for breach of promise of marriage, and notice of trial was given for the *Lent Spring Assizes* for *Suffolk*; but, before the cause was called on, it was intimated on the part of the defendant that he intended to set up a case which would be highly prejudicial to the plaintiff, and the record was withdrawn. The defendant's attorney afterwards proposed to the plaintiff that proceedings should be stayed, alleging that he was in a condition to prove a case which would be an answer to the action; but when the cause was tried at the last *Summer Assizes*, no proof of the kind was offered by the defendant, and the plaintiff got 500*l.* damages. Since that time the plaintiff's costs have been taxed, and no application was ever made by the defendant for the costs of the day for not proceeding to trial at the *Spring Assizes*: they might have been moved for in *Easter* or *Trinity Term*; and now, after final judgment, this application comes too late. Final judgment was signed on the 7th of *November*, and this motion was not made till the 11th. In the *King's Bench* the writ is ended by the taxation of costs. There ought to be some limit as to time for such a motion. Costs

1833.

DAVID WHATLEY *v.* MORLAND.

THIS was an action on a bill of exchange, which came on to be tried before *Tindal*, C. J., at the last *Gloucester Assizes*, but was referred, and the arbitrator had since made an award in favour of the plaintiff. *Humfrey*, having obtained a rule *nisi* for staying or setting aside the certificate of the arbitrator, on the ground that the plaintiff had attended by counsel before the arbitrator without having given notice to the defendant—

Denman Whatley shewed cause.—He objected that the rule ought to have stated the grounds of the motion; and cited *Watkins v. Philpots* (a), where it was admitted, that, on the plea side of the Court, the objections to the award ought to be specified in the rule.

Humfrey.—The motion was made within the first four days of the term.

BAYLEY, B.—I think the grounds of the motion ought to have been mentioned in the rule; but you can amend.

D. Whatley, however, waived the objection, and contended that there had been sufficient notice given that counsel would be employed.

It appeared from the affidavits on both sides, that, though there had been some conversation about the plaintiff's employing counsel, no distinct notice of that fact had been given to the other side; and that the defendant, on attending before the arbitrator and finding that the plaintiff had counsel, applied for an adjournment to give him time to instruct counsel, but the plaintiff had insisted upon having the costs of the day.

Where a cause was referred, and the plaintiff attended before the arbitrator by counsel, without giving distinct notice to the opposite party that he intended to do so, the Court ordered the cause to be referred back to the arbitrator, and disallowed the plaintiff his costs of the day.

Held, also, that the rule *nisi* in such a case ought to have specified the grounds of the motion.

(a) 1 M'Clel. & Y. 394.

1833.
WHATLEY
v.
MORLAND.

BAYLEY, B.—It is not reasonable that one party should have the assistance of counsel and the other not. Distinct notice ought to have been given; and I think the plaintiff is not entitled to the costs of the day. The rule must be absolute; and, as the time for making the award has expired, it may be enlarged.

The other Barons concurred.

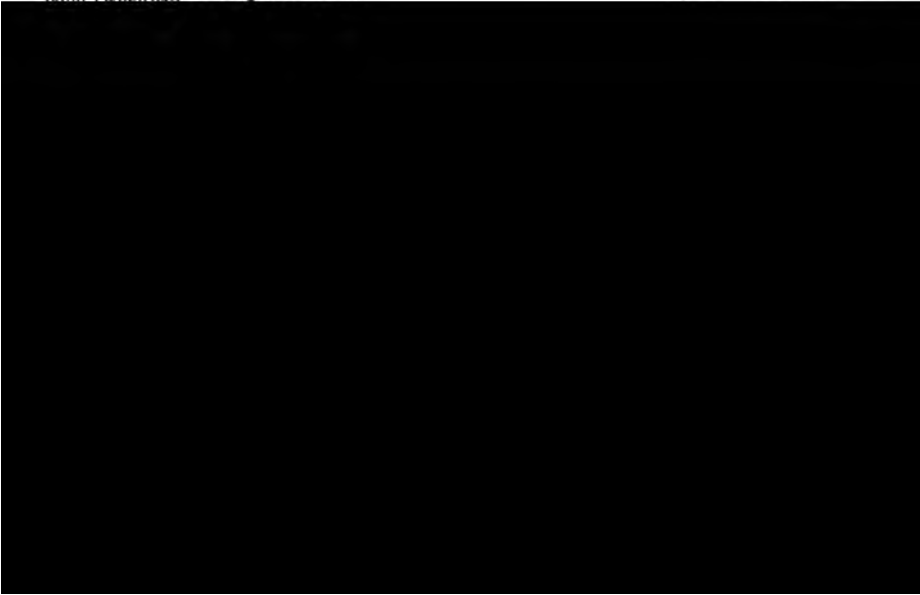
Rule absolute, without costs; the defendant consenting to the time for making the award being enlarged to the fourth day of *Easter* Term, and the certificate to be stayed, and the cause referred back to the arbitrator. The costs not be costs in the cause.



ROURKE v. BOURNE.

The Court of
Exchequer will
stay proceed-
ings on the bail
bond (when bail

HUMFREY had obtained a rule *nisi* for staying proceedings on the bail bond, bail above having been put in and perfected.



pear that a trial has been lost, and unless there has, we never prevent bail from being relieved.

1833.

ROURKE
v.
BOURNE.

Rule absolute, on payment of costs, and short notice of trial to be taken, if necessary.

FISHER v. NICHOLAS.

THIS was a rule which had been obtained by *Archbold*, calling on the plaintiff to shew cause why the *cognovit* given in this action should not be set aside and proceedings stayed; and why a bill of exchange deposited with *Fisher* (the defendant's former attorney, not the plaintiff) should not be delivered up by him to the defendant.

The rule of *H. T. 2 W. 4*, s. 72, respecting *cognovits* given by prisoners, must be strictly complied with; and it must expressly appear that the attorney who attended on behalf of the defendant did so at his request, and was named by him, otherwise the Court will set it aside. *Semble*, that that part of the rule requiring the attorney to declare himself to be attorney

John Williams shewed cause.—The objection to the *cognovit* is, that it does not comply with the late rule of Court (a). The defendant was arrested for 73*l.* 9*s.* at the suit of the plaintiff, on a bill of exchange, and taken to a lock-up house. Having sent to *Clift & Fisher*, his attorneys, neither of whom was within, one *Barratt*, a clerk, and

for the defendant, and state that he subscribes as such, means, that such declaration and statement should be in writing.

Semble, also, that a substantial compliance with the rule is not sufficient, if the express terms of the rule are not fulfilled.

(a) *H. T. 2 W. 4*, s. 72, which directs that no warrant of attorney to confess judgment or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending

at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.

1833.
FISHER
v.
NICHOLAS.

not an attorney, attended from *Clift & Fisher's* office on the defendant, and he, by the advice of *Barratt*, gave a *cognovit*. It was signed "*W. W. Mason*, attorney, *Red Lion Square*; *S. Barratt*, *Red Lion Square*." There was an affidavit of the plaintiff's attorney, and *Barratt*, and *Mason*, from which it appeared that *Barratt*, on behalf of *Clift & Fisher*, went to *Mason*, who was an attorney, and lived next door, and requested him to attend for them; that he did attend for them at the house where the defendant was in custody, and explained the matter to the defendant, and asked him if he knew what he was going to do, and told him, that, if he did not pay the money by the second day of term, he might be arrested. *Mason* swore that the reason why he did not add to his signature, "attorney for defendant," was because he was not his regular attorney. *Clift & Fisher* made no affidavit.

BOLLAND, B.—*Mason* did not declare himself to be attorney for the defendant, or state that he subscribed as such attorney, either verbally or on the *cognovit*. Neither does it appear that *Mason* attended at the defendant's request.

defendant, and the Court would not set the warrant of attorney aside (a).

1833.

FISHER
v.
NICHOLAS.

J. Williams.—Yes; they discharged the rule.

BAYLEY, B.—And a strong act it was.

J. Williams.—Formerly, *cognovits* were not within the rule. In *Osborne v. Davis*, the Court said that it would be very mischievous, and prevent much accommodation to prisoners, if the defendant must have his own attorney present. Here *Barratt*, without any interference of the plaintiff's attorney, and because his masters are both out, asks *Mason* to attend. All the forms have been substantially complied with.

F. Pollock and *Archbold*, in support of the rule, upon the intimation of *Bayley*, B., abandoned that part of the rule which required *Fisher* to give up the bill of exchange.

BAYLEY, B.—I think the *cognovit* ought to be set aside. The Court ought to act on the obvious construction of the rule, without considering whether what is done is equivalent. The rule expressly says, that the *cognovit* shall not be of any force unless there is present an attorney expressly named by the prisoner, and attending at his request. Those are important words. The only person attending as an attorney is *Mason*; but there is nothing to shew that he was expressly named by the defendant, or attended at his request; and therefore there is not a substantial compliance with the rule. It has been argued, that, according to *Osborne v. Davis*, any attorney being present is a sufficient compliance. I cannot help thinking that the Judges, in deciding that case, did not look at the


(a) *Osborne v. Davis*, 4 Taunt. 797.

1833.
FISHER
v.
NICHOLAS.

language of the rule, because nothing is said about those words. The old rule contained the same words as the new one. I think that if the Court had looked at those words they would not have decided without making some observation upon them. But that case does not go the full length of this, though there is no distinction in substance. If *Fisher* or *Clift* had attended, that would have been a compliance with the rule: I therefore think this *cognovit* is of no force.

VAUGHAN, B.—I think there is neither a literal nor a substantial compliance with the rule. We shall in all cases have to say whether a declaration was or was not made at the time, and whether the attorney stated himself to be so.

BOLLAND, B.—The object of the rule was to protect persons in custody. There is no imputation of any fraud, but we can only look to the rule. The defendant should have an attorney present, who is named by him, and who can inform him about the matter. I threw out that the words "declare, &c." are equivocal: I should have said it ought to appear in writing, if I had been called upon



this was not a compliance with the rule of Easter, 4 Geo. 2, which declares "that no warrant of attorney executed by a person in custody of the sheriff, &c., shall be valid, unless there be present

an attorney on his behalf, to be expressly named by him, and attending at his request to witness it;" and the warrant of attorney and the proceedings thereon were set aside as irregular.

1833.

FISHER
v.
NICHOLAS.

ATTORNEY-GENERAL v. BIRCH.

THIS defendant with several others, who had been served with process out of the *Exchequer* at the suit of the Attorney-General, for not paying taxes, requiring them to appear, &c., appeared in Court in person, alleging that they were too poor to obtain legal assistance.

It was stated by the officer of the Court, that the book was at the office, and was never brought down to Court; and that the defendants must either appear by attorney, or get the leave of the Court, on motion, to appear in person.

A defendant, against whom process is issued out of the *Exchequer* at the suit of the Attorney-General, is at liberty to appear in person, and to have his appearance entered in the proper book by the officer, without the necessity of an order of the Court for that purpose.

John Jervis, amicus curiæ, mentioned a similar case, in which he said, the Court had ordered the officer to bring down the minute book, and enter the appearance of the defendant free of expense.

BAYLEY, B.—There is no occasion for a personal appearance here: the usual course is to enter an appearance in the book. The defendants have certainly a right to enter their appearance in person if they think proper, without an order of the Court. Let the appearances be entered at the office.

1833.

WOODGATE v. BALDOCK.

In an action against a sheriff for a false return, and for an excessive levy, and for not paying over the residue, the Court refused to allow the sheriff to pay money into Court, with costs, though it appeared that the sheriff had by mistake retained money to pay hop duty to the Crown, but which was subsequently discovered to have been paid, and had also made charges for possession and other charges usually made, but in strictness not allowable.

WATSON, on behalf of the sheriff, obtained a rule *nisi* to amend the return made to a writ of *venditioni exponas*, and to pay a sum of 21*l.* 5*s.* 10*d.* into Court, in an action brought against him for a false return.

Hutchinson shewed cause, and contended that there was no precedent for such a motion. A writ was sent to the sheriff on *September* 8th, 1832, to levy 36*l.* 15*s.* On *September* 15th, he seized goods, as it is sworn, to the amount of 63*l.* 9*s.* 4*d.* An action was then brought against the sheriff for an excessive levy, and for misconduct about the sale, and for extortion, and for not paying over the residue; and the sheriff has pleaded the general issue, and the cause is at issue. The affidavits disclose a case of gross misconduct on the part of the officers in squandering the money levied, instead of satisfying the execution.

Watson contra.—This is not a motion on behalf of the officer, but the sheriff. In *Jefferys v. Sheppard (a)*, the Court allowed the sheriff, who was sued for the amount of

was informed that a sum was due for duty, which had not been paid, and the sheriff had therefore retained money to pay the duty: it has been since ascertained that the officer was misinformed. There are also several sums charged in the account, as for possession money, &c., which, though reasonable charges, the sheriff could not justify in an action for extortion; and he is willing to pay a sum of money into Court, with the costs of the action.

1833.
WOODGATE
v.
BALDOCK.

Per Curiam.—This is a motion really made on behalf of the officer, though ostensibly on behalf of the sheriff. The plaintiff complains of misconduct in the sheriff or his officers; he has a right vested in him to recover damages for the injury he has thereby sustained, and he ought to be at liberty to try that action. The officer has given security to the sheriff, and there is no reason why the Court should exonerate him from liability.

Rule discharged, with costs.

HART v. DALLY.

THE issue in this action was made up in the old form, with a memorandum that the plaintiff was a debtor to the King, and brought his bill into Court, &c., the action having been commenced by writ of summons. The declaration was regular.

If the issue is now made up with the memorandum formerly introduced, that the plaintiff has brought his bill into Court, &c., it is irregular, and the Court will compel the plaintiff to set it right.

Mansel having applied for a rule *nisi* to set aside the issue on the ground of irregularity, the Court desired him to call on the other side to strike out the unnecessary matter; but, upon application, they refused to do so, and contended it was right: the Court, thereupon, granted him a rule to set it aside, as irregular.

The matter was afterwards arranged.

1833.

One partner may use the names of his copartners in legal proceedings, and they cannot stay proceedings; but the partners who object have a right to be indemnified against the costs.

WHITEHEAD and Others, Assignees, v. HUGHES.

WHITEHEAD and *Greenwood* being in partnership together as lime-burners, *Greenwood* became bankrupt. The present action was commenced by *Whitehead* in the names of the assignees and himself jointly, without the consent of the assignees, and against their wish: the assignees having received from the defendant 117*l.*, and considering that the defendant had paid all that was due, but *Whitehead* claiming a further sum from him,

W. H. Watson, under these circumstances, obtained a rule *nisi*, on behalf of the assignees, for staying all the proceedings, with costs.

Crompton and *Sewell* shewed cause; and contended that the solvent partner, being obliged to join the assignees in the action for conformity, was under the necessity of adding their names in this action, which was for a joint cause of action; and that it would be a very hard case if one partner, by colluding with the defendant, could prevent the other partners recovering joint property: that if the assignees had any remedy, it was in equity.

ner ought to be at liberty to use the names of the assignees in this action.

1833.
 WHITEHEAD
 v.
 HUGHES.

BAYLEY, B.—One of several partners has a right to use the name of the firm: if the other partner objects, he has a right to come to the Court for security. I have always understood the law to be so. The rule must be discharged, with costs, as it was moved with costs.

BOLLAND, B.—The defendant has paid 117*l.*, and *Whitehead* claims 150*l.*

Rule discharged, with costs; and to be made part of the rule, that the assignees should be indemnified against the action.

GREGORY *q. t. v.* ELVIDGE. SAME *v.* LAMBERT.
 SAME *v.* WILLOUGHBY.

PLATT moved on behalf of the defendants in these actions for a rule to shew cause why the plaintiff should not give security for costs. It was sworn that those and many other actions had been brought by the same plaintiff and the same attorney; that they were *qui tam* actions for the recovery of penalties for keeping unlicensed places for dancing, music, &c.; and that the plaintiff was a man of straw, who lived in lodgings of 2*s.* a week, and would not be able to satisfy the costs of the actions if he failed in them.

The Court will not compel a plaintiff in a *qui tam* action to give security for costs, though he is sworn to be a pauper, and has a very great number of actions by the same attorney.

BAYLEY, B.—Many *qui tam* actions have been brought by men worth nothing, but there is no instance of their being compelled to give security for costs. It might hap-

1833.

GREGORY
q. t. v.
ELVIDOR.

pen that the penalties had been incurred, but that their recovery would be defeated by requiring such security.

The rest of the Court concurred.

Rule refused.

JOHNSON v. NEVISON.

In an action on a deed, the venue may be changed under special circumstances, though an undertaking to try at the Sittings has been given; and an affidavit shewing that there was a good defence on the merits was held equivalent to a positive affidavit that there was such a defence.

THIS was an application on the part of the defendant for leave to change the venue from *Middlesex* to *Staffordshire*. The action was on a deed against the defendant, as surety for securing the payment of 100*l.* to the plaintiff. The affidavit in support of the motion stated that six witnesses for the defendant, necessary and material to prove the issue, lived in *Staffordshire*, and that if the plaintiff called any witnesses, they would also come from *Staffordshire*; that the defendant had a good defence to the action, inasmuch as the principal had paid to the plaintiff sufficient money to exonerate the defendant from his covenant.

Tomlinson shewed cause upon an affidavit, which stated that an undertaking had been given to try at the second

sary to swear to a good defence, it should be stated to be on the merits.

1833.

JOHNSON
v.
NEVISON.

Richards.—Every case of this sort depends on its own particular circumstances. It is not denied that all the witnesses on both sides reside in *Staffordshire*: if there were only a preponderance of witnesses in favour of the defendant resident in the latter county, the Court would not allow the venue to be retained in *Middlesex*. The defendant is merely a surety; and we shew that he has a good defence on the merits, because we say the plaintiff has been paid by the principal.

BAYLEY, B.—I think the affidavit is equivalent to swearing to a good defence on the merits; for it is said that the deed for receiving the 100*l.* is satisfied by payment.

The other Barons concurred.

Rule absolute: the costs to be costs in the cause.

WORRALL v. DEANE.

HUMFREY shewed cause against a rule which had been obtained by *Platt* for setting aside an award, on the ground that the submission had been revoked before the award was made. The application comes too late. The award was made on the 8th of *April*: since then *Easter* and *Trinity* Terms have elapsed. In the last term we made a motion for an attachment, against which cause was shewn, and the rule was discharged, because we had de-

A motion to set aside an award made under an order of a Judge must be made promptly after the party knows of the award being made. Where such a motion was made after two terms had elapsed, the Court discharged it with costs,

though it was alleged by the party moving, that he did not believe that the other party intended to proceed upon the award, as there had been a previous revocation.

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1833.
WORRALL
v.
DEANE.

manded too much. It appears they knew of the award soon after it was made. This motion was not made till the 5th of *November*. He cited the case of *M'Arthur v. Campbell*, in the *King's Bench* (a), where the arbitrator awarded himself 100 guineas, the sum awarded being only 6*l.*, in consequence of which neither party took it up—a motion in *Easter Term* to set it aside, the award having been made in *November*, was held by *Parke, J.*, to be too late; and *Emet v. Ogden* (b), where an application in the next term was held too late, though the applicant was misled by being told by the other side that they intended to move to set aside the award, and never did so.

Platt, in support of the rule.—We could not foresee that they would proceed to act on a void award. The motion for an attachment was only discharged the last day of last term; and until they moved we had no idea they would attempt to put the law in motion. The particular mode of reference is material to be attended to. There are three modes: one by bond or agreement, one by order of a Judge, and one by order of *Nisi Prius*. The submission in this case was by order of a Judge. If it had been by order of *Nisi Prius*, that being equivalent to a verdict, we should have been bound to move within four

applying: the hardship would be the same if the award had been within the statute of *William* (a).

1833.
WORRALL
v.
DEANE.

BAYLEY, B.—There is no sufficient reason stated for not applying earlier. You must come promptly. If the award is void, you need not have applied.

BOLLAND, B.—It appears you knew when the award was made, and you ought to have applied earlier.

Rule discharged, with costs (b).

(a) 9 & 10 Will. 3, c. 15, s. 12. insist rigidly on a compliance
(b) In *Reworthorn v. Arnold*, 6 with the rule as to time, if a suffi-
B. & C. 629, Lord Tenterden in- cient ground was stated for ask-
timated that the Court would not ing indulgence.

SOUTER v. WATTS.

CLARKSON had obtained a rule *nisi* for staying the proceedings in this action till another suit between the same parties for the same cause was disposed of.

Where a second action was brought for the same cause of action, whilst a former one was pending, the Court discharged a rule for staying the proceedings in the second action, upon the affidavit of the plaintiff disclaiming the act of his attorney in bringing the first action.

Barstow shewed cause on an affidavit of the plaintiff, that he had never authorized the former action, which was commenced so far back as the year 1828, and to which the general issue was pleaded, and nothing further has been done in it.

Clarkson, in support of the rule, contended that the plaintiff's remedy was against his attorney; the defendant having no means of telling upon what authority the action was brought. The plaintiff swears he merely gave his attorney authority to write a letter, but not to sue.

BAYLEY, B.—The common course would have been to

1833.

SOUTER
v.
WATTS.

plead in abatement the pendency of the former action ; then there would have been no costs on either side, and the defendant might have failed, if it did not appear that the plaintiff brought the former action. The defendant may, perhaps, have a remedy against the attorney for having sued him improperly ; but we cannot make the plaintiff discontinue the first action, for he has no power over it : the rule must, therefore, be discharged.

Rule discharged, without costs.



HODSON v. TERRALL.

The Court will not interfere to compel an attorney to pay over money, the right to which is dependent on the existence of a special agreement between the client and the attorney, which the lat-

THIS was an application by the plaintiff against his attorney, calling on him to shew cause why he should not pay over to him the sums of 15*l.* and 12*l.* The 15*l.* was a sum which had been deposited with the defendant as stakeholder, on a game at cricket ; and the plaintiff had employed the attorney to recover it from him on the terms, as he swore, of paying only taxed costs, and that the amount of the verdict was, at all events, to be paid over to

BAYLEY, B.—I think we cannot interfere. You must go before a jury, who will be competent to decide whether there was such an agreement.

1833.
HODSON
v.
TERRALL.

Rule discharged, with costs (a).

(a) See *Beal v. Langstaff*, 2 Wils. 371.

DOE *d.* FRY *v.* FRY and Another.

ADDISON moved for an attachment against the lessor of the plaintiff for nonpayment of costs, the defendants having got a verdict. There were two defences, and two consent rules; the costs were taxed on one rule. The question was, whether it was necessary that a *capias* should previously issue either against the lessor of the plaintiff or the nominal plaintiff.

The *capias* against the nominal plaintiff in an ejectment need not now be issued previously to moving for an attachment against the lessor of the plaintiff, for non-payment of costs to the defendant after verdict.

BAYLEY, B.—You cannot have a *capias* with any effect: you may take a rule.

Rule granted.

JONES *v.* KEY.

THIS was an action for penalties against the defendant for allowing a person to share in a public contract, who was at the time a member of Parliament. The defendant, being under terms to plead issuably and rejoin gratis, pleaded a plea of a prior action brought for the same

A defendant, who is under terms to "rejoin gratis," is not bound to join in demurrer gratis.

Two actions for penalties having been

brought for the same offence, and the defendant having pleaded the prior action in bar of the second, in which the declaration contained six counts, the declaration in the former action containing only four, a Judge made an order that two of the counts should be struck out, as being unnecessary; and the Court refused to set aside that order.

1833.

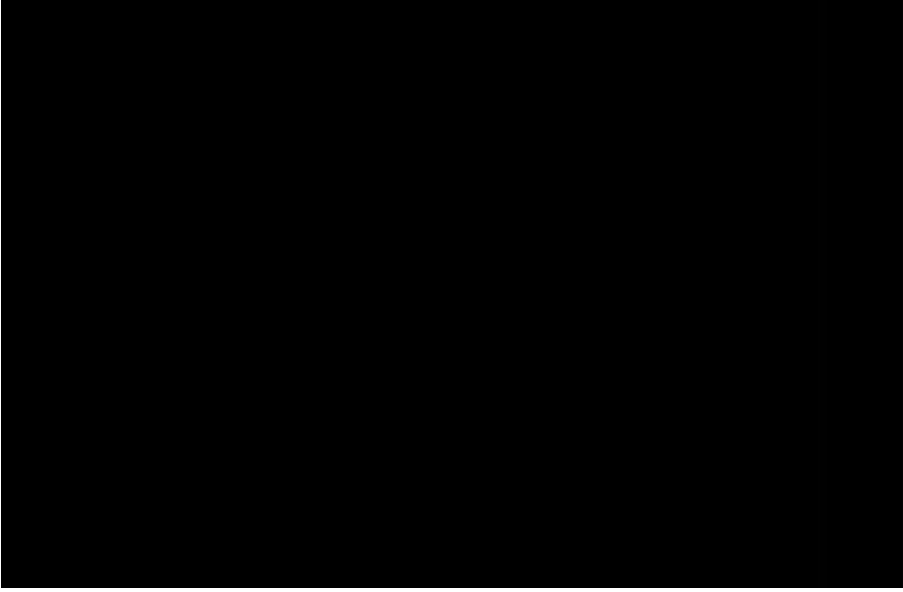
JONES
v.
KEY.

penalties. The declaration in the present action contained six counts for different penalties, varying the mode of stating the offence according to the terms of the act: the declaration in the previous action contained only four counts for four penalties. The plaintiff demurred to the plea, and demanded a joinder in demurrer; and, without ruling the defendant to join in demurrer, signed judgment for want of a joinder. The defendant then took out two summonses, one for striking out two of the counts in the declaration in this action, to make it correspond with the declaration in the former action, and the other for setting aside the judgment for irregularity; and *Vaughan, B.*, made two orders for those purposes.

Mansel now moved to set aside those orders, and contended, first, that the learned Baron had no authority to strike out the two counts.

VAUGHAN, B.—It appeared to me that all the counts were not necessary.

BAYLEY, B.—We are to look at the pleadings and particulars united: there does not appear to me to be any



sideration; but he may want time to look into the merits of a demurrer. "Rejoin" is a term well known, and applies to a rejoinder, and not to a joinder in demurrer.

1833.

JONES
v.
KEY.

The rest of the Court concurring—

Rule refused.

ANDERDON v. ALEXANDER, Earl of STIRLING; sued as
ALEXANDER HUMPHREY, calling himself Earl of STIR-
LING.

KNOWLES shewed cause against a rule *nisi* for setting aside the proceedings to outlawry, which had been obtained by *Taddy*, Serjt., on the ground of irregularity—the defendant being a *Scotch* peer, and not liable to a *capias*. The *capias* and outlawry described him as "*Alexander Humphrey*, calling himself Earl of *Stirling*." There was an affidavit of merits. He resisted the motion on two grounds: 1st, that the Court would not try a question of peerage upon motion; and, 2ndly, that the defendant was too late in his application to the Court. There were many cases, he said, in which the Court had refused motions to discharge out of custody peers who had been arrested, upon the ground that they ought to plead their privilege in abatement; and where the Court interfered it had always been in respect of an undisputed title, with only one exception, that of the present defendant, who was discharged by the Court of *Common Pleas* from a *capias*; but the effect of that decision was overturned by the subsequent decisions of the same Court, which afterwards refused to discharge this defendant from a *ca. sa.* under which he had been taken in execution (a). The defendant had in more than one case unsuccessfully pleaded his peerage; once in this Court, in *Stirling v. Clayton* (b),

Where a defendant moved to set aside proceedings to outlawry for irregularity, the last of the proclamations being in August, and the motion being made at the commencement of Michaelmas Term:—Held too late, it not appearing that the defendant was not apprized of the first commencement of the proceedings, but on the contrary there being reason to believe that he was; the onus lying on the defendant to shew that he was ignorant of the proceedings.

(a) 8 Bing. 55, 416; 9 Id. 412.

(b) 1 Crompt. & Mee. 241.

1833.
ANDERDON
v.
ALEXANDER.

where he was plaintiff, the defendant pleaded in abatement that he was not Earl of *Stirling*, to which the plaintiff replied that he was; but the Court held the replication to be bad, because it did not shew them how he was intitled. He now came before the Court, therefore, in the character of a person who had twice failed in his endeavours to prove his peerage; but at all events he was too late in his application, because the *capias*, which was the foundation of the outlawry, was issued as far back as *November*, 1832, and the plaintiff's attorney, shortly before it was issued, called at the defendant's house, saw his son, and told him he was about to bring an action against his father upon two bills of exchange of 1500*l.* each, and the son said he would acquaint his father with it; and the plaintiff's attorney called again in the Spring of 1833, and told two sons of the defendant that the proceedings were in progress. The defendant, in his affidavit, did not swear precisely that he was unacquainted with the proceedings until lately, however he might wish the Court to infer that to be the fact. He swore that he had been informed within a few days past that the plaintiff had, in *November*, 1832, made an affidavit of debt against him in 2300*l.*, to hold him to bail as a commoner, but that no further

ed for was too critical ; that the word "proceeding" must be taken to mean "proceedings;" and that the affidavits must be construed to mean that the defendant was not acquainted with any of the proceedings until the *Saturday* before the motion was made. The proceedings in the outlawry were not completed till *August*; and he said it had never been decided that a party was precluded from moving because the long vacation was suffered to go by.

1833.
ANDERDON
v.
ALEXANDER.

BAYLEY, B.—It has been so held; because now a party might be moving after judgment and execution.

Lord LYNDHURST, C. B., said he had no doubt upon the point. A *capias* was issued against the defendant in *November*, 1832, and that *capias* was the foundation of the proceedings to outlawry, which the defendant now sought to set aside; and the objection was to this writ of *capias*, which it was said would not lie against the defendant. It therefore lay upon the defendant to shew that he knew nothing of that writ until a little before the application to the Court; but so far from satisfying the Court of that fact, it neither appeared to the Court that he did not know of it, but it rather appeared from the whole of the affidavits, that he did know of it. The rule must therefore be discharged, with costs.

Rule discharged, with costs.

DANN v. CREASE.

ERLE moved for a rule *nisi*, for reviewing the Master's taxation, under these circumstances:—This was an action

In an action of slander, the jury gave 50*l.* damages on the first count, and

100*l.* damages on the other nine counts, one of which latter counts was held bad in error; and the plaintiff agreed to remit the 100*l.* damages:—*Held*, that he thereby gave up all the costs on the last nine counts.

1833.

DANN
v.
CREASE.

of slander—there were ten counts in the declaration. The jury gave a verdict on the first count, with 50*l.* damages, and on the other counts, 100*l.* A writ of error was afterwards brought in the *Exchequer Chamber*, on the fifth, sixth, and seventh counts. The costs had been taxed generally on all the counts at 104*l.* The Court of *Exchequer Chamber* was of opinion that the seventh count could not be sustained, and a *venire de novo* was about to be awarded, when it was agreed, by leave of the Court, that the plaintiff should enter a *remittitur* as to all the counts except the first, and keep his verdict upon that for the 50*l.* It was contended by *Erle*, that, as the whole judgment would have been reversed, and a *venire de novo* awarded, unless the plaintiff had remitted his damages as to the last nine counts, and as the costs were entire on the whole record, the plaintiff could not be entitled to costs on the last nine counts, and that the Master's taxation which gave him the costs of three counts was erroneous. The order of the Court of *Exchequer Chamber* was, that the judgment on the first count should be affirmed and entered up for 50*l.*, and the judgment reversed as to all the other counts, and a *remittitur* entered. The Court granted a rule *nisi* for reviewing the taxation, and for deducting the

claration ; only one count was bad, and we were entitled to nominal damages on all the good counts. Upon the face of the record there could be no error in claiming costs. The bargain was made in the *Exchequer Chamber*; how can an application be made here about it? Assuming that the jury did right, the defendant would have had to pay the costs of the second trial. They should have expressly stipulated about the costs as well as the damages. He cited *Adams v. Meredith* (a).

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v.
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BAYLEY, B.—If the Court had set aside the verdict as to the nine counts, would not the whole cause have gone to trial? The bargain about the damages means the damages and every thing connected with them. You cannot be entitled to have costs taxed upon counts on which you are not entitled to any. You ought to have no costs of the issue. Upon a second trial you would not have the costs of the first trial as you have now. We cannot speculate that you would have the same verdict on the second trial. The whole judgment must be reversed as to the costs, because they are taxed entire. The case cited is an authority against the plaintiff: it shews that a party ought to be restored to all that he has lost; here he has not been. Here, the verdict on the nine counts cannot be sustained as to any of them, because, the damages being entire, there must be a *venire de novo* on those nine counts. The second jury might give only one shilling, or a verdict upon some of the counts, or 1000*l*. The plaintiff submitted to have the 100*l*. damages remitted: the costs are appendant to them, and properly resulting from them. The plaintiff has judgment on the first count, and entire costs as to all: but as to part he is clearly not entitled to them. The damages are the peg on which you are to hang the

(a) 3 Y. & J. 419.

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costs. The costs must be referred back to the Master, who will say what costs are applicable to the nine counts.

VAUGHAN, B.—If you elect to remit the damages, you remit the costs.

BOLLAND, B.—I am of the same opinion. In *Bird v. Appleton* (a) it was held, that, where a *venire de novo* was awarded, and the verdict was for the plaintiff on the second trial, and the jury again found for him on the third trial, he was only entitled to the costs of the last trial, unless it was otherwise expressed in the rule granting the new trial; and in *Edwards v. Brown* (b), where a *venire de novo* was awarded, it was held, that, though the plaintiff, having had a verdict on the first trial, succeeded again on the second, yet that he was not entitled to the costs of the first trial.

Rule absolute, without costs—nothing being said in the rule about them.

(a) 1 East, 111.

(b) 1 C. & J. 354.

verdict for 200*l.*, subject to be reduced to 1*s.* upon the defendant delivering up the goods for which the action was brought; a rule of Court was drawn up to that effect by consent of the parties, to which the attornies were parties, and the defendant undertook to deliver the articles, and 26*l.* were to be deducted from the costs, which the defendant would ultimately have to pay. That rule was dated *June* 14th. The plaintiff petitioned the insolvent Court in *August*, and came up to be heard on the 4th of *November*, and on that day *Adcock* was appointed assignee, and immediately gave notice verbally to the defendant and his attorney, that he claimed the goods, and required them to be delivered up to him. The plaintiff's attorney, on the 6th, sent a written notice to the defendant's attorney not to deliver up the goods to any body but himself, as he had a lien; but it appeared that the notice was not received till the 7th, and the goods had been delivered up to the assignee, *Adcock*, on the previous day.

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Kelly, for the assignee, shewed cause, and contended that the dates of the different transactions were an answer to the motion, but that the assignee, not being a party to the action, the Court had no jurisdiction; and that if he had improperly possessed himself of the goods, an action would lie against him, but the Court would not make an order upon him. Even supposing that the assignee had improperly got possession, the Court would have no jurisdiction over him.

BAYLEY, B.—If the plaintiff had continued solvent, the Court might have attached the defendant for not delivering up the goods.

Kelly.—Supposing the defendant had conspired to deliver up the goods fraudulently, in order to defraud the attorney of his lien, the Court would have had no power

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over the third person; an attorney or sheriff would be answerable and liable to the summary process of the Court. It might be a case in which the Insolvent Court might act summarily. *Adcock* is the answerable assignee. The property by the assignment vested in him, and this Court cannot dispose of the insolvent's property upon motion. This is an application not on behalf of the plaintiff, but of his attorney: he says that his client has obtained a verdict substantially for the goods, and that he has a lien; but he can only claim after notice: but the notice was not received till after the goods had been delivered up. If the attorney had improperly delivered up the goods, he did it at his peril; but if a defendant, or his attorney, pays the debt in a lawful way, neither is liable to the plaintiff's attorney: here they acted *bonâ fide*, and the claim was for a general balance.

Jones appeared for two of the defendants.

Bompas, Serjt., in support of the rule.—No party can deliver up goods or money in fraud of the attorney. We claimed a general balance. The delivering up of these goods to the assignee is, in effect, a fraud on the attorney.

Harold Vernon Belland (s)

known that delivering up the goods would be in fraud of the attorney's lien. Knowledge is equivalent to notice.

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LORD LYNTHURST, C. B.—It is necessary, first, to shew that notice was given, or some case of fraud between the defendant and plaintiff to defraud the plaintiff's attorney of his costs. As to the notice, it was not sent till after the goods had been delivered up; and as to fraud, that is necessary to be shewn, according to *Young v. Redhead*. As to the 26*l.*, it was allowed, on the understanding that the articles were to be delivered to the plaintiff personally, and not to the attorney; and when they were delivered to the assignee, they were delivered to the plaintiff's representative, who was entitled to have them.

BAYLEY, B.—The verdict was to be reduced to nominal damages, upon re-delivering the articles to the plaintiff; that must mean to the party who previously had possession of them. It was agreed that 26*l.* should be deducted out of the costs, because it was contemplated that the goods would be delivered up to the plaintiff; and to make up for that the plaintiff undertakes to pay that sum; so that for that sum the defendant looked to the personal responsibility of the plaintiff. I think the assignee is not liable to the attorney's claim.

Rule discharged, without costs; though moved for with costs, Lord *Lyndhurst* saying the rule was not inflexible.

1333.

SMITH *v.* CALVERT.

A party arrested on an attachment for disobedience to a rule of Court, in not paying costs pursuant to a Master's *allocatur*, was discharged, it appearing that *Calver* was written instead of *Calvert*, and the name of the Master to the *allocatur* was *Day* instead of *Dax*.

C. JONES obtained a rule *nisi* for discharging the defendant out of custody, he having been taken on an attachment. The objection was, that the affidavit on which the attachment had been obtained stated that a true copy of the original rule and *allocatur* had been served, but the defendant's name was there written *Calver* instead of *Calvert*, and the name to the *allocatur* was *Day* instead of *Dax*.

Miller shewed cause, and cited *Shaw v. Tytherleigh (a)*, and *Wilson v. Stafford (b)*, to shew that the variance in the name of the defendant was immaterial. It is sworn that the defendant promised, when he was served, to call and pay.

Lord LYNDHURST, C. B.—The copy is imperfect in two respects. It is the same as if it had not been signed at all; and it is sworn to have been a true copy that was served. The rule must be absolute with costs: not to give costs in this case would be a bounty upon negligence.

1833.

IGGULDEN v. TERSON.

THESIGER shewed cause against a rule which had been obtained by *Halcomb*, calling on the plaintiff to shew cause why a rule of Court of the 12th of *June* should not be amended, by inserting that each party should pay his own costs. The action was against the defendant as executor; he pleaded the general issue and *plenè administravit*; and both issues were found for the plaintiff. A motion having been made to set aside the verdict, it was agreed that the defendant should take judgment of assets *quando acciderint*; after two attendances before the Master the rule was drawn up and settled by him, that the verdict for the plaintiff on the second issue should be set aside and judgment taken for 92*l. quando*; he contended that the defendant was not entitled to have the rule altered so as to give him his costs:—and that as the case was fully gone into, the Master and his decision could not now be impeached.

An administrator who pleads the general issue and *plenè administravit*, and succeeds on the latter plea, is entitled to the general costs of the cause.

No affidavit required from counsel as to what passes between them.

Halcomb, *contrà*, contended that there was an offer that each party should pay his own costs.

BAYLEY, B.—There is no affidavit.

Halcomb.—It is irregular to have an affidavit from counsel. The verdict on the second issue being wrong, we were entitled to a new trial on both issues. Upon a judgment of assets *quando*, the defendant as executor was not liable to costs.

BAYLEY, B.—Upon the trial, there was an improper result; for the verdict ought to have been for the defendant on the plea of *plenè administravit*; and then he would have had the general costs of the cause. The rule must, therefore, be absolute, unless the plaintiff consents within a week.

No costs on either side.

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Since the Uniformity of Process Act, an attorney sued with an unprivileged person does not lose his own privilege, and cannot be arrested.

KEEP *v.* BIGGS and POCOCK. MESTAYER *v.* BIGGS.

MANSEL had obtained a rule *nisi*, for setting aside the writ of *capias* issued in the above causes for irregularity; and also that the bail-bonds given by the defendant *Biggs* to the constable of *Dover Castle* should be delivered up to be cancelled; and that he should be discharged on filing common bail; and that the plaintiff should pay the costs occasioned by the arrest.

The irregularity was, that *Biggs* was an attorney, and had been arrested on the joint process in the first action, and at the same time detained upon another writ in the second action. The question had been argued before Mr. Justice *Parke* at Chambers, who was of opinion that the attorney was privileged; but he referred it to the Court.

Follett now shewed cause.—Before the Uniformity of Process Act, an attorney sued with a person not privileged lost his own privilege. He cited *Roberts v. Mason (a)*, where the defendant was sued with his wife, and was held, on that account, not to be entitled to his privilege; and *Byles v. Wilton (b)*, that an attorney in custody for debt

could sue both by the same process, the privilege of the attorney was not lost. Before the act, he must have been sued by a different process, but now the same process can issue against both. The act expressly says that one may be arrested and one served, so that there could be no difficulty in issuing a *capias* against both. Mr. Justice *Parke*, at Chambers, expressed an opinion that the attorney ought only to have been served.

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BIGGS.

The judgment of the Court was deferred, that Mr. Justice *Parke* might be conferred with; and on a subsequent day Lord LYNDHURST delivered the opinion of the Court, that an attorney, when sued with another, is not now liable to be arrested; because, under the new act, there is a means by which one may be arrested and the other served upon the same process; and that the rule should therefore be made absolute.

Rule absolute.

FISHER v. BEGREZ.

THIS was a rule which had been obtained by *Petersdorff*, on behalf of the defendant, calling on the plaintiff and the sheriff to shew cause why the *capias ad satisfaciendum*, under which the defendant had been arrested, should not be set aside, and the money deposited by the defendant in the hands of the sheriff returned, on the ground that the defendant was privileged from arrest. The affidavit stated that the defendant was a servant of the *Bavarian* ambassador—that he was first singer in the *Bavarian* chapel, and sung solos—that it was his duty to attend there on *Sundays* and *Good Fridays*—that he had for the last fourteen years been constantly in the service of his Excellency—that he received 30*l.* a-year for his services—that he was paid by quarterly payments by the cashiers to his Excellency—that he was bound to attend

The privilege of freedom from arrest, which is allowed to ambassadors' servants, is the privilege not of the servant but of the ambassador; and if the latter does not interfere, the Court will not grant relief to a defendant who has been arrested, unless he shews a clear case of service either as domestic servant or under a hiring.


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whenever he was called on to do so, and that he believed no other person was competent to sing the solos.

Follett shewed cause for the plaintiff.—*Platt* appeared for the sheriff.

It was contended for the plaintiff, that the defendant had not, in point of form, brought himself within the statute of *Anne*—that he did not say he was a domestic servant, but only a servant. It was observed, that, since Queen *Anne's* time, many applications had been made to the Court, none of which had been successful, and that in every case the service appeared to have been colourable to avoid the payment of debts. The statute (*a*) mentions “domestic servant,” and it is declaratory of what the common law was. The defendant has no real duties to perform except singing, and that is in the way of his profession; for it is sworn he is a singer by profession, that he gives lessons, that he is a vender of music, and makes some thousands a-year by his business; and he admits, in his own affidavit, that he was arrested as he was going to the *Opera House* to superintend his benefit there. The ambassador lives a mile from the



the sheriff's officer to know if the defendant meant to apply to the Court, he said he did not; and then the officer paid over the money. There are no affidavits from the ambassador, for he has been applied to, and refuses to interfere.

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F. Pollock and *Petersdorff*, in support of the rule.—With respect to the lateness of the application, the money was not paid over till the 4thth of *November*, and the application was made on the 5th. The sheriff had notice of the defendant's privilege before he was arrested, and the name was in the list of privileged persons in the sheriff's office. When the defendant was arrested he protested against it; and on the 27th of *September* a notice was given to the sheriff that the Court would be applied to. Where proceedings are void, no lapse of time can validate them. The defendant is clearly privileged; the affidavits state distinctly that he is in the service of the ambassador: he has been attending constantly, for fourteen years, except on two occasions, when he was ill; and the ambassador has no other chapel, and it is used as his domestic chapel. It is not necessary that he should be a domestic servant; ambassadors and their servants were privileged at common law independently of the statute. The name has been returned to the sheriff's office; which it could not have been, unless it had been considered that he was entitled to his privilege; and he swears he is liable to be constantly called on.

Lord LYNDHURST, C. B.—The service appears to me to be merely colourable. It is sworn that the defendant is a singer and composer, and makes a large sum annually by business. I am not satisfied that the chapel is the property of the *Bavarian* minister: it is not called the domestic chapel of the ambassador; and the money collected at the door goes to defray the expense.

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BAYLEY, B.—The privilege is not of the servant, but of the ambassador. This motion is not made on behalf of the ambassador, or any one connected with him, but on the behalf of the defendant only. Though he says he is liable to be called on at any time, he does not shew that he has ever been called on by the ambassador; neither does he shew how he was hired, or indeed any hiring, by the ambassador, though peculiarly within his own knowledge. I think the rule should be discharged.

BOLLAND and GURNEY, Barons, concurred.

Rule discharged (a).

(a) See *Fisher v. Begrez*, ante, Vol. 1, p. 588.

WIGLEY v. EDWARDS.

The notice of special bail need not state where the bail-piece is filed.

WIGHTMAN obtained a rule *nisi* for setting aside the proceedings taken on the bail-bond, with costs, for irregularity.

had no right to treat it as a nullity, and take proceedings on the bail-bond. He cited *Rex v. Sheriff of Middlesex*, in a cause of *Duncombe v. Crisp* (a), and *Bell v. Foster* (b).

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LORD LYNDHURST, C. B.—The distinction is this:—In the *King's Bench* you put in bail at the Judge's chambers, and the bail-piece is filed there; in this Court it is taken away and filed with the filacer. The notice in the *King's Bench* does not say it was filed with any particular Judge; therefore it is not necessary, in this Court, to say "filed with the filacer." If not necessary in the *King's Bench*, it cannot be so here. I consider it to be wholly unnecessary: it is so stated in Mr. *Price's* book. It was at most a mere informality, and the parties have been put to expense unnecessarily.

BAYLEY, B.—We have been endeavouring to make the practice uniform. In the *King's Bench* and *Common Pleas* it is admitted the proceeding was correct, and there is no authority in this Court to shew it was wrong. There is only one place at which the bail-piece can be filed. The affidavit does not state that the proceedings on the bail-bond were taken, because it was believed that the practice was as is now contended for. It is quite inconsistent with principles of justice, that parties should look with an evil eye at proceedings and notices, in order to find some ground of objection, where they understand the purport of them. The rule must therefore be absolute, with costs.

Rule absolute, with costs.

LORD LYNDHURST, C. B.—In future, it is to be understood that it is not necessary that it should form part of the notice to shew where the bail-piece is filed (c).

(a) *Ante*, p. 5.

(b) *Ante*, Vol. 1, p. 271.

(c) See Petersdorff's *Law of Bail*, 293.

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PERROTT v. DEANE.

A prisoner, who has been brought up under the compulsory clause of the Lords' Act, and has had his sixty days allowed, is not prevented from taking the benefit of the Insolvent Act during that time, and assigning his effects to an assignee; and that is a good excuse for not filing his schedule under the Lords' Act; and if he is brought up again, the Court will give him time till he has been discharged by the Insolvent Act.

THE defendant, who had been brought up before under the Lords' Act, and had his sixty days allowed, was now again brought up, not having filed his schedule within the time.

Erle, for the prisoner.—Before the sixty days expired, the defendant applied to the Insolvent Court, and made the usual assignment of all his property. That is his excuse for not having filed his schedule in this Court.

Follett, contra, contended that the Lords' Act was paramount to the Insolvent Debtors' Act. There is a case in the *King's Bench*, where the party had assigned his property for the benefit of his creditors, and yet it was held he was bound to have filed his schedule.

BAYLEY, B.—That is a very different case. The words of the 32 *Geo. 2*, c. 28, s. 17, are, “If any prisoner charged, or who shall be charged in execution, in any prison or gaol, and who shall be required as aforesaid to be brought up to any such court, assizes, or great sessions as afore-

dulgence, he ought not, by his own act, to prevent his doing what the act of Parliament requires; but he is entitled of right to his sixty days; and as he is to be brought up in the Insolvent Court on the 15th instant, the proper course will be to have the time enlarged till the 20th.

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Time enlarged.

GROVER v. HEATH, Executor of WEEDON.

GROVER, the plaintiff, and *Pollard* (now deceased), bankers at *Hertford*, were the plaintiffs in the feigned issue of *Grover and another v. Giles* (a). Several persons had agreed with the plaintiffs to share the expenses. The decision of the *House of Lords* was given in *July*, 1832. The costs amounted to 466*l.*, and an application was made in *February* of the present year to the defendant for his share of the costs. In *April*, a writ of summons issued; and an order for taxing the costs of *Grover, Smith & Grover*, the plaintiffs' attornies, was applied for; that was before the time for pleading was out: since then, on *June* 18th, after term, the defendant paid the full amount into Court. *Channel* now applied for a rule for taxing the plaintiffs' bills of costs: the affidavit of the defendant stated his belief that the charges were exorbitant, and that a great part would be taken off.

Several persons having agreed to share with a plaintiff the expenses of an action, and he, having paid the attorney's bill, brought an action for contribution against one of those persons, the Court, on his application, ordered the attorney's bill to be taxed, though it had been paid, and the defendant in this action had paid his full share of the money into Court.

BAYLEY, B.—The business was concluded more than a year ago, and you might have applied in *February*. If you can shew any business has been charged for which was not done, or any fraud, or any very exorbitant charges, you might apply. There has been a considerable lapse of time.

(a) See the case in the House of Lords, 2 M. & Scott, 197; 9 Bing. 128, S. C.

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HEATH.

Channel.—Costs have been taxed even after verdict (*a*).

The Court granted a rule *nisi*.

R. V. Richards shewed cause.—This action is by the survivor of the two plaintiffs in *Giles v. Grover*, against the executor of *Weedon*, for his share of the expenses. The plaintiff has paid the bills of *Grover, Smith & Grover*, his attornies, and this action is for money paid to the defendant's use. It is not an action by the attornies, but by the bankers; and the Court will not, as against these plaintiffs, allow the bills to be taxed. An attorney's bill cannot be taxed upon money paid into Court—*Hooper v. Till* (*b*); and the application is too late.

Channel.—The defendant has paid in a full moiety. The plaintiff, though one of the bankers, was also one of the attornies.

LORD LYNTHURST, C. B.—I think the application is reasonable.

The rest of the Court concurred.

Rule absolute.



13th of *August*, gave a bail-bond on the 19th; there was a rule to return the writ, and on the 23rd there was a return of *cepi corpus*. On the 24th, notice of exception was given, requiring bail to justify before a Judge; and on the same day there was a rule to bring in the body. On the 1st of *November* the defendant surrendered in discharge of his bail. The attachment was obtained on the 3rd of *November*.

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Archbold shewed cause.—The question is, whether we could get a rule for bringing in the body between the 10th of *August* and the 24th of *October*; if we could, our proceedings are correct. Notice of exception having been given, the bail ought to have justified in due time: the time for justifying expired on the 28th of *August*. The 2 *Will.* 4, c. 39, s. 11, directs, that all necessary proceedings to judgment and execution may, except as therein after provided, be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: provided that no *declaration or pleading after declaration* shall be filed or delivered between the said 10th day of *August* and 24th day of *October*. Under that act they might have justified; and if they might, they were bound to do so. The exception contained in the proviso does not apply to the justification of bail: it only applies to declarations and subsequent proceedings. In the schedule, No. 4, the form of the *capias* is as follows: “And we hereby require the said defendant to take notice that within eight days after execution hereof on him, inclusive of the day of such execution, he shall cause special bail to be put in for him in our Court of —— to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written, or indorsed hereon.” That warning is in these terms:—“If a

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defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond." The 11 *Geo. 4* & 1 *Will. 4*, c. 12, enables a defendant to justify bail as well in term as in vacation.

BAYLEY, B.—That was before the Uniformity of Process Act.

Archbold.—Before that act the defendant would have been obliged to perfect his bail, and the new act makes no alteration in the law. The rule of *Michaelmas* Term, 1 *Will. 4*, s. 15. directs, that whenever a plaintiff shall rule the sheriff, on a return of *cepi corpus*, to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and by the rule of *Hilary* Term, 1 *Will. 4*, s. 1, bail in vacation may justify at chambers; and by the late rule of *Hilary* Term, 3 *Will. 4*, a Judge's order may be had (after a return of *cepi corpus*) to compel the sheriff to bring in the body in vacation, by putting in and perfecting special bail; and if the sheriff does not stay such order, and it is made a rule of Court in the term next following, an attachment may afterwards be had without any fresh demand.

BAYLEY, B.—The fair meaning is, that you may proceed at all times to final judgment; with this proviso, that between the 10th of *August* and the 24th of *October* you cannot declare or file any declaration or plea: there was nothing to prevent your putting in and perfecting bail. If you could shew, that in consequence of a Judge not attending at chambers you could not justify, that would be a good reason.

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Thesiger.—There was another point. The attachment was obtained after notice of render had been given. Before the late act, after notice of render, an attachment was irregular. No trial could have been lost, because the declaration could not be served before the 24th of *October*.

BAYLEY, B.—There was previously a default on the part of the sheriff. We might relieve you on payment of costs in a case of difficulty.

Lord LYNTHURST, C. B.—The sheriff may have had some difficulty in defining the new law; and the rule, therefore, may be absolute on payments of costs.

Rule absolute on payment of costs.

SEARLE v. BRADSHAW.

COMYN shewed cause against a rule which had been obtained by *Archbold*, for setting aside the interlocutory judgment signed in this action, with costs. The judgment was signed as for want of a plea; a Judge's order having been obtained, by which the defendant was bound to plead

An administrator, who was under terms to plead issuably, pleaded *plene administravit* and his own bankruptcy; the plaintiff signed judgment, treating the pleas as a nullity, being inconsistent with each other, and one of them at least being false; and the Court refused to set aside the judgment.

ing the pleas as a nullity, being inconsistent with each other, and one of them at least being false; and the Court refused to set aside the judgment.

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issuably. The action was brought by the plaintiff, as executor, against the defendant, as administrator, on a simple contract debt for work and labour, &c. The defendant pleaded, *first, plenè administravit—secondly*, a plea of bankruptcy of the defendant, administrator—in bar. There were three sets of counts in the declaration, and in the first set the defendant was not charged personally. The second plea, he contended, was bad, and was clearly no bar to the action, and on which issue could not be taken to the country. Even if the defendant succeeded upon it, judgment might be entered for the plaintiff *non obstante veredicto*. It is a tricking plea; and being bad, it renders both pleas null. *Waterfall v. Slow (a)*. The pleas are inconsistent with each other.

Archbold, in support of the rule.—We did not undertake to plead consistent pleas. The new rules authorize two pleas which are inconsistent, as *non assumpsit* to the whole declaration, and render to part. If only inconsistent, the plaintiff might have applied to discharge the rule for pleading double. A plea of bankruptcy is an issuable plea within the meaning of the Judge's order.

GURNEY, B.—Your second plea cannot be good unless you have had assets, and have committed a *devastavit*; because, if you had done your duty by taking care of the assets, the creditor would have had a right to follow them. The first plea is inconsistent with the second.

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Archbold.—They might have found for the defendant. It has been decided that a demand against an executor may be proved, if he says he has assets. *Ex parte M'Williams* (a). So, a debt may be proved against a trustee. *Ex parte Fairchild* (b); *Ex parte Watson* (c). Where goods are in the hands of a bankrupt administrator, the creditor has a remedy by applying to the Bankrupt Court by petition, and the Court divides the property without further trouble. We wish to avoid a *scire fieri* inquiry. The pleas were pleaded *bonâ fide*; and there is an affidavit of merits.

BAYLEY, B.—We have never known such a plea of bankruptcy. The commission was in *September*, 1830. The intestate died in *February*, 1830. The only ground of the second plea is, that a *devastavit* was committed; but the *devastavit* should have been before the bankruptcy, though the administration need not. I go on the inconsistency of the pleas; one of them is a novel plea. Bankruptcy cannot be a defence unless there has been a *devastavit*, and not then until the *devastavit* has been suggested; but then the plaintiff has a right to go against the assets if he can find them. The plea seems to me to be premature: but it clearly cannot be good if the first plea is true; and there has therefore been a breach of the order of the Judge. If you could satisfy us that there really are no assets, we should be inclined to let you stand on the plea of *plenè administravit*.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged.

(a) 1 Scho. & Lef. 173.

(b) 1 Gl. & Jam. 221.

(c) 2 Ves. & B. 414.

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ALLEN v. GIBBON.

Where an application is made to the Court by the sheriff under the Interpleader Act, the Court cannot try the right of the different claimants upon affidavit, but must direct an issue.

The circumstance of the goods seized being in the possession of a stranger and not of the defendant, against whom the execution issued, does not prevent the sheriff applying under the act.

THIS was an application under the Interpleader Act on behalf of the sheriff of *Carmarthen*.

Hutchinson shewed cause.—I appear for the claimants, who are trustees under a deed executed by two persons on behalf of themselves and other creditors. Under that deed the trustees took possession of the goods, and the sheriff seized them in our possession. This is not a case within the act: the sheriff has not levied on goods which are in the possession or custody of the defendant. He cited *Wilton v. Chambers*.

Whitmore, for the execution creditor.—The writ was delivered to the sheriff on the 28th, and the deed was not executed till the 31st. The goods are bound from the teste of the writ. *Payne v. Drew* (a): which is recognised in *Thurston v. Mills* (b). The dates are admitted. The question therefore is merely one of law, which the Court can decide.

Carrington, for the sheriff.

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BLACKBURN v. PEAT.

THIS was an action of *assumpsit* for goods sold. The declaration was delivered on the 24th of *October*, with a demand of plea, and judgment was signed on the 29th for want of a plea. *Hoggins* having obtained a rule *nisi* to set it aside, on the ground that there was a plea in the office at the time—

Heaton shewed cause, and objected, in the first place, that the motion was out of time, not having been made till nine days after the judgment was signed; and he referred to r. 33, *H. 2 Will. 4*, that such an application must be made within a reasonable time.

BAYLEY, B.—It lies upon the defendant to shew that he came in time.

There being some doubt when the fact of the judgment being signed came to the defendant's knowledge, it was allowed to be referred to the Master to see when the defendant first knew of it; and the Master having reported that it was not known to him till the 5th, the Court held that the defendant was in time.

It appeared from the affidavits, that the plaintiff's attorney resided at a distance of seven miles from town, and that his name and place of abode were entered in the Master's book; but there was no other entry in the book of any place in *London*, *Westminster*, or the borough of *Southwark*, or within one mile of the office, where he might be served with notices, &c. as directed by the rule of this Court (*a*). The defendant's attorney, on the 28th, sent a

An attorney residing within a mile of the *Exchequer* Office must enter in the proper book either his place of abode, or some other proper place where notices, &c. may be served on him. If he resides beyond one mile, and within ten, he must enter some proper place within one mile; and entering his place of abode is, in such case, not a sufficient compliance with the rule of *M. 1 Will. 4*, r. 8, *Exch.*

That rule extends to all proceedings, though only "notices, summonses, orders, and rules" are mentioned in it.

The rule, that applications to set aside proceedings must be made within a reasonable time, is construed with reference to the time when the applicant first had a knowledge of the irregularity.

(a) R. 8, *M. 1 Will. 4*, *Exch.*, which directs "that the clerk of the pleas or his deputy shall forthwith cause to be prepared a proper alphabetical book for the pur-

poses after mentioned; and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk,

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plea of the general issue to the plaintiff's at his residence by the two-penny post, but which it appeared did not reach him till the next morning after the clerk had started to sign judgment; and the same day (the 28th) the plea was stuck up in the office, and another was entered in the plea book. The question turned upon the construction of the above rule.

Heaton contended, that, the rule being in the alternative, the plaintiff's attorney had sufficiently complied with its directions, by giving his own place of abode, which was within ten miles, though it was not within one mile of the office; and that, according to the plain and obvious construction of the rule, an attorney who lived within ten miles had the option of giving his own place of abode, or some other proper place within one mile; that the reason of the rule was, that attornies who had no regular place of residence should have some known place where notices

without fee or reward; and that every attorney admitted in this Court, and residing in *London*, or within ten miles of the same, shall forthwith enter in such book,

orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require personal service,

might be served; and that it would be a great hardship on attornies, who reside within a few miles of town, to have two places of business, or else to employ an agent. And he cited the rule as explained by Mr. Justice *Aston*, in *Loff's Reports* (a). But, supposing that the rule was susceptible of a different construction, and that it was obligatory upon all attornies living within ten miles to have some other proper place within a mile, he contended that the rule did not apply to the present case, for it only mentions "notices, summonses, orders, and rules," and does not mention pleadings.

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LORD LYNDHURST, C. B.—The rule embraces pleas as well as notices: the rule means, that every attorney within ten miles must either give his place of abode or some other proper place, within one mile.

BAYLEY, B.—There can be no doubt what was meant; the object was, that a person having to deliver a notice should not have to go several miles out of town in order to serve it; but that there should be some place within a mile of the office pointed out by the attorney, where service might be made. By the introduction of the words "some other proper place," the attorney has an option, which he otherwise would not have had, and he may either have notices left at his place of abode, or some other proper place to be named by him. By putting a stop after "place" the meaning is made clearer; and the subsequent words "in *London*, &c." apply as well to the attorney's place of abode, as to the "other proper place;" and the Master tells us, it is the custom for all attornies so situated to have some place within one mile of the office, where notices may be left. It is not suggested by the at-

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torney that he was misled. The rule must be absolute, with costs.

Rule absolute, with costs (a).

(a) It is a little singular that this rule is usually printed without a stop after "place," as if the limitation of one mile was not intended to apply to the attorney's place of abode, if he chose to enter that in the book; and Mr. *Tidd* and Mr. *Impey* do not seem to have regarded the rule as obligatory upon attornies in this respect, for they say "it is usual," and "it is expected," that practitioners *living remote* from the inns of Court should add to their name and *place of abode* the name and

place of abode of some other person living near the inns of Court, where notices, &c. may be served. (See *Tidd*, 9th ed. p. 72; *Impey*, K. B. 10th ed. p. 33). The construction now put upon the rule is evidently the true one, and the only one calculated to effect the object of the rule, which is recited in that of the Court of *King's Bench*, which is in the same terms as the present, *viz.* to prevent the difficulty and delay in serving attornies residing in the neighbourhood of *London* with notices, &c.

NICHOLSON v. LEMAN and ROWE.

An *alias copias* may be issued more than four months after the expiration of the

A BAILABLE writ was issued against both the defendants, under which *Rowe* was arrested on the 1st of *August*, and he put in bail. The other defendant could not

Channel shewed cause.—The old rule, that an *alias* writ must be tested of the day that the former writ expired, does not apply to writs under the Uniformity Act, because formerly a writ might be tested back; but now it cannot, as every writ must be tested on the day it issues. Here the operation of the first writ was not at an end till it had run four months; it could not be necessary, therefore, to issue an *alias* during that time, nor could it be done: the *alias* must have been issued afterwards; and the act specified no time within which the *alias* writ should issue. The 10th section of the Uniformity Act (*a*) enacts, "That no writ issued by authority of that act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon; or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ, shall be issued within one such calendar month after the expiration of the preceding writ," &c. The statute authorizes a continuation of the first writ, and points out how it must be done to avoid the Statute of Limitations; it is contended, however, that the latter part applies to other cases and to all writs: but the first part only of the section applies to this case; the latter part does not. The statute having given

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(*a*) 2 Will. 4, c. 39.

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a calendar month in one case is an argument to shew that in other cases parties were not restricted to the same time.

Mansel, in support of the rule.—By the old rule, a second writ ought to be tested of the return of the former one. By the 10th section of the act, no writ can be in force for more than four calendar months, and may be continued by *alias* and *pluries*; and it goes on to enact, “that every writ (if any) issued in continuation of the former writ, shall be returned *non est inventus*, and entered of record within one month after the expiration of the preceding writ.” Formerly, there was a continuance on record. There ought to be some return to the first writ; here there is none, nor any continuance: the first writ, therefore, is no longer in force, for there is no connection between that and the second, which was issued more than a month after the first writ had expired.

BAYLEY, B.—You can have the return entered at any time. The question is, whether you may not enter continuances now? It seems to me that the entry necessary to connect the first writ with the *alias* may be entered at any time. There is no obligation to do it. That the second writ need not be tested of the last day of the four



VAUGHAN *v.* TREWENT.

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WHITCOMBE had obtained a rule *nisi* calling on the defendant to shew cause why he should not produce an agreement to enable the plaintiff to get it properly stamped. Application had been made and refused.

Where a motion was made to compel a defendant to produce an instrument to have it stamped, the Court, on making the rule absolute, refused to allow more costs than the plaintiff would have been entitled to if the application had been made to a judge at chambers.

J. Evans shewed cause.—The defendant has no objection to the instrument being stamped, but he objects to paying the costs of this application. The instrument is an indenture of apprenticeship, whereby the plaintiff's son was apprenticed to the defendant, and was discharged by him for misconduct. The application was to deliver up the deed *to the plaintiff*.

BAYLEY, B.—But did you offer to get it stamped?

LORD LYNTHURST, C. B.—There is no pretence for resisting this motion; but it appears to us that this is an application which ought to have been made at chambers; and the rule, therefore, will be absolute, with such costs only as the plaintiff would have been entitled to, if the application had been made to a Judge at chambers.

Rule absolute.

M'ALPINE *v.* COLES.

THIS was an action against the defendant for the breach of an agreement in not procuring for the plaintiff a situation abroad, and for the expenses the plaintiff was put to in removing himself and family, and returning. The jury gave 500*l.* damages. Two witnesses, sons of the plaintiff, had been brought from *Barbadoes*, for the purpose of proving the plaintiff's case. They were sworn to be es-

Since the 1 *Will.* 4, c. 22, it is discretionary with the Court whether they will allow the expenses of foreign witnesses brought over for the purposes of a cause, or only the costs of a commission.

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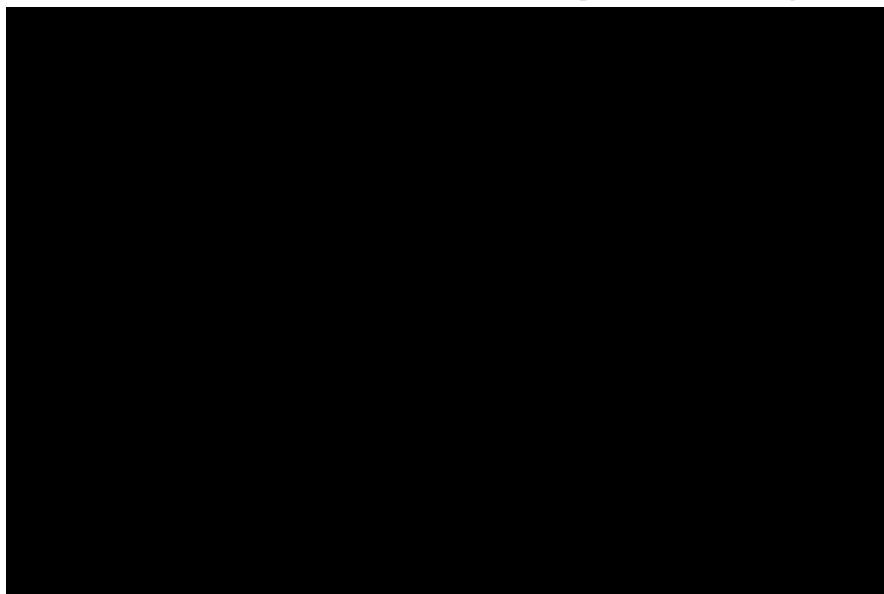
sential. The Master, in taxing costs, had allowed the expenses of their journey here and back, and during their stay here, amounting altogether to 380*l*.

Richards having obtained a rule *nisi* for revising the Master's report, and for disallowing the expenses of the witnesses' voyage here and back—

Erle shewed cause, and referred to *Tremain v. Barrett* (a), where it was held, that if a witness is *bond fide* sent for from a foreign country, for the sake of his testimony in an intended action, though the writ is not sued out till after his arrival, the plaintiff is entitled to the costs of bringing him over, his expenses here, and the costs of his return.

Lord LYNDHURST, C. B.—Would it have been safe to examine these witnesses under a commission?

Erle.—The whole case rested upon those two witnesses. Prudence might require that they should be brought over. The 1 *Will.* 4, c. 22, gives the Court power to examine witnesses in any of his Majesty's foreign possessions; but the act is not obligatory: it is optional with the party



compel the attendance of witnesses abroad, to prevent injustice, the 13 *Geo.* 3, c. 63, gave the Court power to issue a commission for the examination of witnesses in *India*, and the 1 *Will.* 4, c. 22, has extended that power over all his Majesty's foreign possessions. The Master has exercised no discretion in this case, thinking himself bound by the cases. It appears to me that it is for the discretion of the Court in each particular case; but we will consult with the Judges of the other Courts, and if we are of opinion that it will depend upon the facts of each particular case, we will refer it back to the Master to inquire.

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VAUGHAN, B.—There is no provision in the act altering the jurisdiction or discretion of the Court. In a late case in the *King's Bench* the Master allowed the costs; but the question is now before Mr. Justice *Parke*.

Upon a subsequent day, *Vaughan*, B., who tried the cause, expressing his opinion that it was a case in which the witnesses were properly brought over, the Master's report was confirmed; Lord *Lyndhurst* observing, that they had conferred with the Judges of the other Courts on the question as to the effect of the late act with respect to witnesses brought from abroad, and they were all of opinion that that act had made no difference; that it was still a matter for the discretion of the Master: and that in this instance the Court were of opinion that the Master had exercised a proper discretion in allowing the expenses of the witnesses from abroad; and that, therefore, there was no reason for disturbing his report.

Rule discharged.

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DOW v. CLARK.

An infant plaintiff suing by *prochein amy* was nonsuited, and then sued out a writ of error, but allowed the return-day to pass without taking any steps towards the prosecution of it. The defendant then issued execution against him for the costs of the nonsuit:—*Held*, that the execution was regular, though the writ of error was not *non-prossed*; and that it was the plaintiff's duty to have prosecuted it, and not have allowed it to expire. *Quære*, whether an infant plaintiff, being nonsuited, is liable to be taken in execution for

PRICE obtained a rule *nisi* to set aside a *capias* which had been issued against the plaintiff, and to discharge him out of custody, on the ground that he was an infant. He sued in this action by *prochein amy*, and was nonsuited, and the execution was issued against him for the costs. And the objection was, that a writ of error had been sued out, notice of which was duly served on the defendant before the *capias* issued.

Butt shewed cause.—The *capias* was regularly issued. The writ of error was returnable on the 23rd of *April*, and has not been proceeded in. The plaintiff is liable for these costs: at all events the Court will not interfere summarily. *Gardiner v. Holt* (a), *Finlay v. Fowle* (b).

Price, in support of the rule.—The infant is not liable to costs. The Court will not compel him to give security for costs (c). An infant taken in execution ought to be discharged, as he is not liable to pay the costs of a nonsuit. *Grave v. Grave* (d). [*Bayley*, B.—There the plaintiff sued by guardian, here he sues by *prochein amy*. *Gardiner v. Holt* is exactly analogous to the present.] If so,

not done so, and therefore could not rule us to transcribe; neither could we proceed upon it till we were able to get at the record.

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BAYLEY, B.—It was the plaintiff's duty to have pursued the writ of error, which was returnable on the 23rd of *April*; by that day he ought to have transcribed the record and assigned his error; but he allowed the time to pass, and the writ of error became spent. If the defendant would not bring in the record, the plaintiff might have ruled him to do so; and a Judge at chambers would have made an order that the roll should be brought in; but it was not necessary for the defendant to rule the plaintiff to transcribe. The rule, therefore, must be discharged.

Upon the following day Mr. Baron *Bayley* stated that he had been looking into the cases, and it appeared to him to be doubtful whether the plaintiff had been properly taken in execution for these costs; and he observed, that, in *Finlay v. Fowle*, the plaintiff had concealed his infancy: and he directed that point to be again argued. But in the meantime Mr. *Butt* informed the Court that the matter had been arranged, and the point was not further discussed.

Note.—This and the previous case were decided in last Trinity Term, but were unavoidably omitted in their proper place.

Hilary Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

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REGULÆ GENERALES.

IT IS ORDERED, That, from and after the first day of Easter Term next inclusive, the following Rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, and Courts of Error in the Exchequer Chamber.

Demurrer delivered, not filed.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties.

Points stated before demurrer signed.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not as heretofore by any officer of the Court.

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Issue and demurrer, how made up.

6. No motion or rule for a concilium shall be required; but demurrers, as well as all special cases, and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of one shilling; and notice thereof shall be given forthwith by such party to the opposite party.

Special case and demurrer set down without concilium.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

Paper books, how delivered.

8. Where a defendant shall plead a plea of judgment recovered in another Court, he shall in the margin of such plea state the date of such judgment, and, if such judgment shall be in a Court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the

In plea of judgment recovered, number of roll stated in margin.

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Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge.

Error.—Writ of error no supersedeas till service with points to be argued.

9. No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.

Execution if point frivolous.

Provided, that if the error stated in such notice shall appear to be frivolous, the Court or a Judge, upon summons, may order execution to issue.

No rule to certify and transcribe.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the Court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the clerk of the errors of the Court of

12. The assignment of errors and subsequent pleadings thereon shall be delivered to the attorney of the opposite party, and not filed with any officer of the Court.

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Proceedings in error, delivery of.

13. No scire facias ad audiendum errores shall be necessary (unless in case of a change of parties), but the plaintiff in error may demand a joinder in error, or plead to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound within twenty days after such demand to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

No sci. fa. ad audiendum errores.

Joinder in error within twenty days.

Provided, that if in any case the time allowed as hereinbefore mentioned for getting the transcript prepared and examined for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the tenth day of August in any year, the party entitled to such time shall have the like time for the same purpose, after the twenty-fourth day of October, without reckoning any of the days before the tenth of August.

Where twenty days expire after 10th August.

Provided also, that in all cases such time may be extended by a Judge's order.

Further time allowed.

Provided also, that, in all cases of writs of error to reverse fines and common recoveries, a scire facias to the terre-tenants shall issue as heretofore.

Not to apply to errors in fines, &c.

14. When issue in law is joined, either party may set down the case for argument with the clerk of the errors of the Court of Error, or the clerk of the rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a concilium.

Setting down case for argument.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench on writs of error from the Common Pleas

Error books, delivery of.

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or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies.

Proceedings in
error not entered
before argu-
ment.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument; but, after judgment shall have been given in the Court of Error in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the Court below, on a certificate of a clerk of the errors of the Exchequer Chamber of the judgment given, for which a fee of 3*s.* 4*d.*, and no more, shall be charged.

Notice of taxa-
tion.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or
by his attorney or guardian, notwithstanding the general

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town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a Judge why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided, that, if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause.

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FORM OF NOTICE REFERRED TO.

A.

In the K. B. }
 C. P. }
 or Exchequer. } *A. B. v. C. D.*

Take notice, that the {plaintiff
 defendant} in this cause
 proposes to adduce in evidence the several documents
 hereunder specified, and that the same may be inspected
 by the {defendant,
 plaintiff,} his attorney, or agent, at ———,
 on ———, between the hours of ———; and that
 the {defendant}
 {plaintiff} will be required to admit that such of
 the said documents as are specified to be originals were
 respectively written, signed, or executed, as they purport
 respectively to have been; that such as are specified as
 copies are true copies; and such documents as are stated
 to have been served, sent, or delivered, were so served,
 sent, or delivered respectively; saving all just exceptions

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ORIGINALS.

<i>Description of the Documents.</i>	<i>Date.</i>
Deed of Covenant between A. B. and C. D., 1st part; } and E. F. 2nd part - - - - - }	1st January, 1828
Indenture of Lease from A. B. to C. D. - - -	1st February, 1828
Indenture of Release between A. B. and C. D., 1st part, &c.	2nd February, 1828
Letter, Defendant to Plaintiff - - - - -	1st March, 1828
Policy of Insurance on Goods by ship Isabella on Voyage } from Oporto to London - - - - - }	3rd December, 1827
Memorandum of Agreement between C. D., Captain of } said Ship, and E. F. - - - - - }	1st January, 1828
Bill of Exchange for £100 at Three Months, drawn by A. } B. on and accepted by C. D., indorsed by E. F. and G. H. }	1st May, 1829

COPIES.

<i>Description of Documents.</i>	<i>Date.</i>	<i>Original or Duplicate served, sent, or delivered, when, how, and by whom.</i>
Register of Baptism of A. } B. in the Parish of X. - }	1st January, 1808.	
Letter, Plaintiff to Defen- } dant - - - - - }	1st February, 1828.	{ Sent by General Post, 2nd February, 1828.
Notice to produce Papers -	1st March, 1828.	{ Served 2nd March, 1828, on Defendant's Attor- ney, by E. F. of——
Record of a Judgment of } the Court of King's } Bench, in an action, } J. S. v. J. N. - - - }	Trinity Term, 10th Geo. IV.	
Letters Patent of King } Charles II. in the Rolls } Chapel - - - - - }	1st January, 1680.	

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Recital of stat.
3 & 4 W. 4,
c. 42, s. 1.

HILARY TERM, 4 WILL. 4.

Whereas it is provided by the stat. 3 & 4 Will. 4, c. 42, s. 1, that the Judges of the superior Courts of Common Law at Westminster, or any eight or more of them, of whom the Chiefs of each of the said Courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which rules, orders, and regulations were to be laid before both Houses of Parliament as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both Houses of Parliament, but after that time should be binding and obligatory on the said Courts, and all other Courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament;

Provided, that no such rule or order should have the



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FIRST GENERAL RULES AND REGULATIONS.

1. Every pleading, as well as the declaration, shall be intituled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.
- All pleadings are intituled of the day and year when pleaded, and so entered of record.
2. No entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made, upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.
- No continuances to be entered.
- Provided, that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.
- Not to affect the times of proceeding.
- Provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in Banco, or at *Nisi Prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.
- Plea, puis darrein continuance.
- Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the Court or a Judge shall otherwise order.
- Affidavit to verify.
3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.
- Judgment entered of day when signed.
- Provided, that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.
- Nunc pro tunc.

1834.

Warrants of attorney not to be entered.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and, by the said act of the 3rd & 4th Will. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged:

Several counts and pleas, where allowed.

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Examples in declarations.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Contract with condition.

Ex. gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be al-



money, or otherwise, are to be considered as founded on distinct subject-matters of complaint; for the debt and the security are different contracts; and such counts are to be allowed.

1834.

Two counts upon the same policy of insurance are not to be allowed. Policies.

But, a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed. Premium.

Two counts on the same charter-party are not to be allowed. Charter-parties.

But, a count for freight upon a charter-party, and for freight pro ratâ itineris, upon a contract implied by law, are to be allowed. Freight.

Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed. Demise, and use and occupation.

In actions of tort for misfeasance, several counts, for the same injury, varying the description of it, are not to be allowed. Misfeasance.

In the like actions for nonfeasance, several counts, founded on varied statements of the same duty, are not to be allowed. Nonfeasance.

Several counts in trespass, for acts committed at the same time and place, are not to be allowed. Trespass.

Where several debts are alleged in indebitatus assumpsit to be due in respect of several matters, *ex. gr.*, for wages, work, and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts. Indebitatus assumpsit.

1834.
Account stated.

Provided, that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

Several breaches.

The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

Instances of pleas and avowries, &c.

Ex. gr.—Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar, in replevin, are within the rule), are not to be allowed.

Payment.

Pleas of solvit ad diem, and of solvit post diem, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

Accord and satisfaction—Release.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Liability of third party.

Pleas of an agreement to accept the security of *A. B.*, in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct, and to be allowed.

Agreement to forbear in consideration of

But, pleas of an agreement to accept the security of a third person, in discharge of the plaintiff's demand, and

But, pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

1834.
Right of common.

So, pleas of a right of way over the locus in quo, varying the termini or the purposes, are not to be allowed.

Right of way.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

Distress for rent, and damage feasant.

But, avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

Distress for rent.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

The above cases instances only.

6. Where more than one count, plea, avowry, or cognizance shall have been used in apparent violation of the preceding rules, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is bonâ fide intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application, which shall be allowed.

Violation of these rules, how taken advantage of.

1834.
 Costs of counts
 and pleas.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings: and further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance, allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was bonâ fide intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge before whom the trial is had shall be of opinion that no such distinct subject-matter of complaint was bonâ fide intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each

plea, avowry, or cognizance so allowed, and shall so certify

9. In a plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication, or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action; provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.

1834.

Commencement
and conclusion
of pleas, &c.

10. No formal defence shall be required in a plea, and it shall commence as follows:—"The said defendant, by ———, his attorney, [*or*, in person, &c.], says that ———

Commencement
of plea.

11. It shall not be necessary to state in a second or other plea or avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

Second plea.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

Protestation.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Traversea.

Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial.

Opposite party
may plead over.

14. The form of a demurrer shall be as follows:—"The said defendant, by ———, his attorney, [*or*, in person, &c., *or* plaintiff], says that the declaration [*or* plea, &c.]

Form of de-
murrer.

1834.

Joinder in demurrer.

is not sufficient in law," *shewing the special causes of demurrer, if any.*

The form of a joinder in demurrer shall be as follows:—
 "The said plaintiff [*or defendant*] says that the declaration [*or plea, &c.*] is sufficient in law."

Entry of proceedings on record.

15. The entry of proceedings on the record for trial, or on the judgment-roll, (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

Charge for issue.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the Assizes, or of any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

Payment of money into Court.

17. When money is paid into Court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis*:—

"C. D.) The — day of —
 ats. }

shall be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21; but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand.

1834.
money into Court except in certain cases.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, "that he has sustained damages [*or, that the defendant is indebted to him, as the case may be*] to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

Proceeding by plaintiff after payment of money into Court.

20. In all cases under the 3 & 4 Will. 4, c. 42, s. 10, in which, after a plea in abatement of the nonjoinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

Commencement of declaration after plea of nonjoinder.

"[*Venue.*].—*A. B.*, by *E. F.*, his attorney, [*or, in his own proper person, &c.*], complains of *C. D.* and *G. H.*, who have been summoned to answer the said *A. B.*, and which said *C. D.* has heretofore pleaded in abatement the nonjoinder of the said *G. H.*, &c." [*The same form to be used mutatis mutandis in cases of arrest or detainer.*]

21. In all actions by and against assignees of a bankrupt

Character of

1834.
assignees, &c.,
to be taken as
admitted, unless
specially de-
nied.

or insolvent, or executors or administrators, or persons authorized by act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

I.—*Assumpsit.*

Effect of non
assumpsit.

1. IN all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Instances:
Warranty.

Ex. gr.—In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or

Policy.

of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

1834.

2. In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact: *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

Bills and notes, no general issue.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

In assumpsit, matters in confession and avoidance to be pleaded specially.

4. In actions on policies of assurance the interest of the assured may be averred thus:—"That A., B., C., and D., or some or one of them, were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

Statement of interest of assured.

II.—*In Covenant and Debt.*

1. In debt on specialty or covenant, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

Non est factum.

2. The plea of "nil debet" shall not be allowed in any action.

Nil debet.

1834.
General issue in
debt.

Matters in con-
fession and
avoidance
pleaded spe-
cially.

Pleas in other
actions.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that " he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of assumpsit.

4. In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III.—*Detinet.*

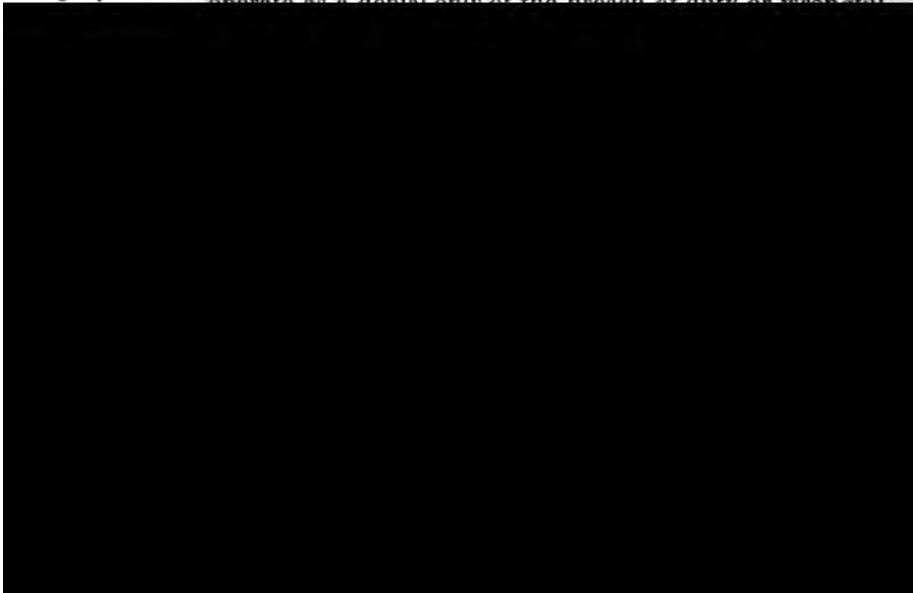
Non detinet.

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV.—*In Case.*

Effect of not
guilty.

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful



In an action on the case, for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

1834.
Right of way.
Trove.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

Slander.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

Escape.

In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

Carriers.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

Matters in confession and avoidance pleaded specially.

V.—*In Trespass.*

1. In actions of trespass quare clausum fregit, the close or place in which, &c., must be designated, in the declaration, by name or abutments, or other description; in failure whereof the defendant may demur specially.

Abutments in declaration.

2. In actions of trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

Effect of not guilty in trespass qu. cl. fr.

1834.
 In trespass de
 bon. asp.

3. In actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

Right of way.

4. Where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified.

Common of
 pasture.

5. And where, in an action of trespass quare clausum fregit, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plain-

shall apply to any case in which the declaration shall bear date before the first day of Easter Term next.

1834.

Issues, Judgments, and other Proceedings in Actions commenced by Process under 2 Will. 4, c. 39, shall be in the several Forms in the Schedule hereunto annexed, or to the like effect, *mutatis mutandis*: Provided, that, in case of non-compliance, the Court or a Judge may give leave to amend.

No. 1.

Form of an Issue in the King's Bench, Common Pleas, or Exchequer.

In the King's Bench; *or*,
In the Common Pleas; *or*,
In the Exchequer.

The [*date of declaration*] day of ———, in the ——— year of our Lord 18—.

[*Venue.*]—*A. B.*, by *E. F.*, his attorney, [*or*, in his own proper person, *or*, by *E. F.*, who is admitted by the Court here to prosecute for the said *A. B.*, who is an infant within the age of twenty-one years, as the next friend of the said *A. B.*, *as the case may be*], complains of *C. D.*, who has been summoned to answer the said *A. B.*, [*or*, arrested *or* detained in custody] by virtue [*or*, served with a copy, *as the case may be*] of a writ issued on [*date of first writ*] the ——— day of ———, in the year of our Lord 18—, out of the Court of our Lord the King, before the King himself at Westminster, [*or*, out of the Court of our Lord the King, before his Justices at Westminster, *or*, out of the Court of our Lord the King, before the Barons of his Exchequer at Westminster, *as the case may be*]; For that

[*Copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.*]

1834.

Thereupon the Sheriff is commanded that he cause to come here, on the — day of —, twelve &c., by whom &c., and who neither &c., to recognise &c., because as well &c.

No. 2.

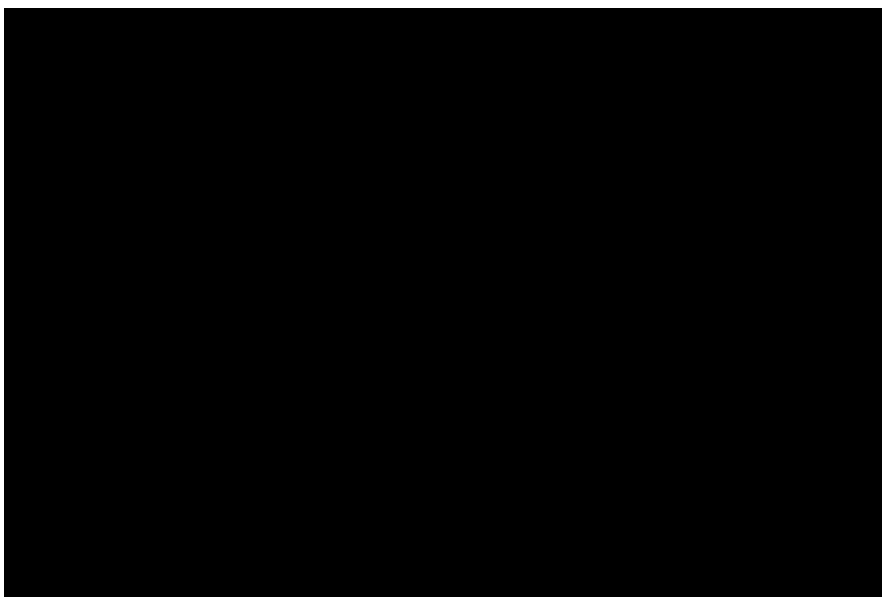
Form of Nisi Prius Record in the King's Bench, Common Pleas, or Exchequer.

[*The placita are to be omitted.—Copy the issue to the end of the award of the venire, and proceed as follows :*]

Afterwards, on the [*teste of distringas or habeas copora*] day of —, in the year —, the Jury between the parties aforesaid is respited here until the [*return day of distringas or habeas corpora*] day of —, unless — shall first come on the [*first day of sittings or commission day of assizes*] day of —, at —, according to the form of the statute in such case made and provided for default of the Jurors, because none of them did appear. Therefore let the Sheriff have the bodies of the said Jurors accordingly.

[*The postea is to be in the usual form.*]

No. 3.



attornies aforesaid, [*or as the case may be*]; and ———, before whom the said issue was tried, hath sent hither his record had before him, in these words:

1834.

[*Copy postea.*]

Therefore, it is considered that the said *A. B.* do recover, against the said *C. D.*, his said damages, costs, and charges, by the Jurors aforesaid, in form aforesaid, assessed; and also £——— for his costs and charges, by the Court here adjudged of increase to the said *A. B.*, with his assent; which said damages, costs, and charges in the whole amount to £———, and the said *C. D.* in mercy, &c.

No. 4.

Form of the Issue when it is directed to be tried by the Sheriff.

[*After the joinder of issue proceed as follows:*]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon on the [*teste of writ of trial*] day of ———, in the year ———, pursuant to the statute in that case made and provided, the Sheriff [*or, the Judge of ———, being a Court of Record for the recovery of debt in the said county, as the case may be,*] is commanded that he summon twelve &c., who neither &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly; and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lord the King to him in that behalf directed, with the finding of the Jury thereon indorsed, on the ——— day of ———, &c.

1834.

No. 5.

Form of Writ of Trial.

William the Fourth, by &c., to the Sheriff of our County of —, [*or, to the Judge of —, being a Court of Record for the Recovery of Debt, in our County of —, as the case may be.*]

Whereas *A. B.*, in our Court before us at Westminster, [*or, in our Court before our Justices at Westminster, or, in our Court before the Barons of our Exchequer at Westminster, as the case may be*], on the [*date of first writ of summons*] day of — last, impleaded *C. D.* in an action on promises [*or as the case may be*]; for that whereas one &c., [*here recite the declaration as in a writ of inquiry*]; and thereupon he brought suit. And whereas the defendant, on the — day of — last, by —, his attorney, [*or as the case may be*], came into our said Court and said, [*here recite the pleas and pleadings to the joinder of issue*], and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*; and it is fitting that the issue above joined should be tried before you the said Sheriff of —, [*or, Judge, as the case may be*]: We therefore, pursuant to the statute

No. 6.

1834.

Form of Indorsement thereon of the Verdict.

Afterwards, on the [*day of trial*] day of ———, in the year ———, before me, Sheriff of the county of ———, [*or, Judge of the Court of ———*], came as well the within-named plaintiff as the within-named defendant, by their respective attornies within named, [*or as the case may be*]; and the jurors of the jury by me duly summoned, as within commanded, also came, and, being duly sworn to try the said issue within mentioned on their oath, said, that ———.

No. 7.

Form of Indorsement thereon, in case a Nonsuit takes place.

[*After the words "duly sworn to try the issue within mentioned" proceed as follows:*]

And were ready to give their verdict in that behalf; but the said *A. B.*, being solemnly called, came not, nor did he further prosecute his said suit against the said *C. D.*

No. 8.

Form of Judgment for the Plaintiff after Trial by the Sheriff.

[*Copy the issue, and then proceed as follows:*]

Afterwards, on the [*day of signing judgment*] day of ———, in the year ———, came the parties aforesaid, by their respective attornies aforesaid, [*or as the case may be*], and the said Sheriff, [*or, Judge, as the case may be*], before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words; to wit:

[*Copy the Indorsement.*]

Therefore it is considered, &c., [*in the same form as before*].

1834.

MORGAN and Wife v. THOMAS.

Where an action was brought in the name of husband and wife, without the authority of the husband, the Court, on application, ordered proceedings to be stayed until an indemnity was given to the husband.

MAULE had obtained a rule *nisi* for staying the proceedings in this action, on the ground that it was brought in the husband's name without his authority. The plaintiffs were suing as assignees of a bail-bond. It was sworn that the wife had been living separate from her husband for several years; that he could neither read nor write, but had been induced by the wife to go to a public-house and sign a paper, which was not read to him, and of the nature of which he was ignorant. The husband wished that the present action should not go on.

R. V. Richards shewed cause.—The original action was on a promissory note which had been given to the wife: the husband's name was used from necessity. It appears from my affidavits that no unfair advantage has been taken of him, and that he authorized this action; and if he did, he cannot now recall his authority. In one case, where the husband had released the action, the Court ordered the plea of release to be taken off the file. Issue is now joined.

Maule, in reply.—The paper was not read over to the

1834.

LARNDER v. DICK.

JERVIS, K. C., moved for a rule for reviewing the Master's taxation of costs. This was an action on the case for obstructing waters by erecting flood-gates across the stream. There were ten counts stating the possession to be in the plaintiff, and nine others stating the possession to be in a tenant. The jury found a verdict for the plaintiff on the 3rd, 4th, and 13th counts. The Master allowed the plaintiff his general costs, but did not allow the defendant his general costs. The affidavit stated that all the defendant's witnesses, except one, were necessary to prove the issues found for the defendant; that the evidence of *J. P.* and *E. S.* did not materially apply to the issue found for the plaintiff, but principally to the other issues. It was now contended, that, upon the late rule (a), the defendant ought to have had the general costs of the cause upon all the issues but those found for the plaintiff, and to the expenses of witnesses whose evidence was intended to disprove the plaintiff's case.

Where some issues are found for the plaintiff and some for the defendant, the latter is entitled to the costs of the issues found for him, but not to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related exclusively to the issues found for him.

BAYLEY, B.—The Master has allowed the plaintiff the general costs, deducting the costs to which the defendant is entitled: those costs are the costs of the issues. He has not allowed the defendant the costs of his witnesses, because it did not appear that there were any witnesses of his who were called to speak to other subjects, and not to the fact of the flood-gates across the stream. Before the new rule, there would have been no ground for this motion, and I think the Master has adopted the correct rule.

The other Barons concurred.

Rule refused.

(a) R. 74, H. 2 Will. 4, *ante*, Vol. 1, p. 193—"No costs shall be allowed on taxation to a plaintiff upon any counts or issues on which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs."

1834.

NANNY v. KENRICK and PRIMROSE:

Where several defendants defend separately and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge.

THIS was an action for a malicious arrest. The arrest was at the suit of *Kenrick*, and *Primrose* acted as his attorney. They defended separately; and ultimately, having got judgment as in case of a nonsuit, they delivered separate bills of costs. It was objected before the Master that only one bill ought to be allowed, the business having been done in fact jointly: he, however, allowed both bills.

Moody having obtained a rule *nisi* to review the Master's taxation, and that the defendant should pay the costs,

Justice and *Steer* shewed cause.—The business was conducted separately; *Poole* acted for *Primrose*, and *Barnes* for *Kenrick*. The defences having been conducted separately, we are entitled to charge separately. We have been treated as defending separately throughout.

Moody, in support of the rule.—We swear that *Barnes* has in fact conducted both defences. *Primrose* was attorney for *Kenrick* on the previous occasion, and there could be no cause for their defending separately. All the

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J. JERVIS, on behalf of the defendant, obtained a rule nisi, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, and why the plaintiff should not pay to the defendant his costs of the arrest, on the ground that the plaintiff was not at the time of the arrest the holder of the bill of exchange, but had paid it away to *Poinder* and *Hodgson*, who had written to the defendant for the amount.

Thesiger shewed cause.—The plaintiff had dealings with *Poinder & Co.*, and indorsed the bill to them in payment of part of the account. The defendant was the acceptor, and the plaintiff was the indorsee of one *West*: the bill became due on the 31st of *December*, and was placed by *Poinder & Co.* to the general account. The bill not being paid, the plaintiff requested *Poinder & Co.* to write to the defendant, which they did. At the time of the arrest, on the 21st of *January*, we certainly had not got the bill; but when we wanted to declare, we sent for it, and got it from *Poinder & Co.*

It is no ground for discharging a defendant out of custody, that the plaintiff was not at the time of the arrest in possession of the bill of exchange on which the defendant was arrested, and that it was in the possession of persons to whom the plaintiff was indebted, and to whom he had indorsed it over, if it appears that those persons only hold the bill as trustees for the plaintiff, and are willing to give up the bill for the purposes of the suit.

J. Jervis, in support of the rule.—We allege that the plaintiff is indebted to *Poinder & Co.*, and they having the bill, we are in danger of being twice arrested. We are willing to pay; but it does not appear whether the plaintiff is suing on his own account, or as trustee for *Poinder & Co.* It ought, therefore, to be referred to the Master.

BAYLEY, B.—The defendant was liable to be arrested by some one. There certainly was suspicion at first, but, upon inquiry, that might have been removed; for it appears that *Poinder & Co.* were holding the bill as trustees

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for the plaintiff. What was suspicion at first is now by the affidavits fully explained, and therefore the rule must be discharged.

The other Barons concurred.

Rule discharged, with costs.

MONK v. BONHAM.

If the plaintiff gives a sufficient reason for not proceeding to trial pursuant to his notice, the defendant is not entitled to judgment as in case of a nonsuit, or to a peremptory undertaking, in order to get his costs, but must take the cause down by proviso.

THIS was an action on a bill of exchange against the defendant as the acceptor. The plaintiff not having proceeded to trial pursuant to his notice, the defendant obtained a rule *nisi* for judgment as in case of a nonsuit.

Ryland shewed cause.—The bill has been paid, and the action has now been abandoned; and the defendant knew of the payment last *November*.

Welsby, contra, contended that he was entitled to a peremptory undertaking, in order that he might get his

LEWIS v. EICKE.

1834.

THE sheriff of *Kent* having taken goods in execution at the suit of the plaintiff, and the defendant *Charles Eicke*, an attorney, having given a notice and made a claim on behalf of *William Eicke*, the sheriff obtained a rule under the Interpleader Act, calling on all parties to state their claims; but neither *Charles* nor *William Eicke* appearing, the Court made an order that the claim should be barred, and that they should shew cause why both or one of them should not pay the costs (a).

If a claim to goods seized by a sheriff is made by the defendant on behalf of another, which does not appear to be well founded, the Court will make him pay the costs of the sheriff's application under the Interpleader Act.

Humfrey now shewed cause on behalf of *Charles Eicke*. No one appeared for *William Eicke*, neither did he make an affidavit. From the affidavit of *Charles Eicke*, it appeared that he had met the plaintiff at the Master's office, and it was then agreed between them that neither of them should appear, and that some arrangement should be come to.

BAYLEY, B.—Supposing his claim to have been good, why did he not give notice to the sheriff? He would then not have incurred expense in coming here.

Humfrey.—If neither party had appeared, there would then have been only the expense of instructing counsel to make the rule absolute. If he had appeared, he should have had his own costs to have paid. We have been misled by the plaintiff having appeared here contrary to his agreement.

Hutchinson.—If the defendant had shewn that this was a *bond fide* claim, it would make a difference; but there is

(a) See *ante*, p. 222.

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nothing to shew that it was, and the goods have been actually sold by the sheriff, and the execution satisfied.

Clarkson appeared for the sheriff.

Per Curiam.—The rule ought to be made absolute for *Charles Eicke* to pay the costs.

CHILTON *v.* ELLIS.

In order to bring a party into contempt by not paying money according to an order, a demand of the money must be made after the order has been made a rule of Court.

CHILTON moved for an attachment for not paying a sum of money pursuant to the Master's *allocatur*. The order was not made a rule of Court till after a demand had been made of the money.

BAYLEY, B.—That will not do.

Rule refused.

SAUNDERSON *v.* BOURN.

The Court will not grant leave to enter an ap-

BEARE moved for leave to enter an appearance for the defendant, who was a clerk in the victualling department.

1834.

BENTLY v. HOOK.

COOPER had obtained a rule *nisi*, on behalf of the sheriff of *Oxfordshire*, calling on the assignees of *Hook* to appear and state their claim to the goods seized by the sheriff in execution in this action.

The Court will not give relief to the sheriff under the Interpleader Act, unless an actual claim appears to have been made. Giving notice of a fiat in bankruptcy having issued is not equivalent to a claim by the assignees to the goods sold.

R. V. Richards shewed cause for the assignees.

Addison, for the execution creditor, objected, that it did not appear that any claim had been made by the assignees.

Cooper, in support of his rule.—It is stated that notice was given to us of the bankruptcy of the defendant, and that a fiat had been issued against him; we were bound to take notice of that. If the parties had come by consent, the Court would have made a rule; and now, all parties having appeared, the objection is waived. Giving notice of a fiat in bankruptcy is equivalent to a claim.

BAYLEY, B.—It does not appear by whom the notice is given.

GURNEY, B.—The foundation of the rule is, that a claim has been made. The bankruptcy of the defendant may be a ground for asking for time to return the writ, but it must appear that a claim has been made.

Rule discharged, with costs.

1834.

PAULL v. PAULL.

An attachment for not performing an award will not be granted if an action has been commenced, except upon the terms of discontinuing the action, and paying the costs.

Where a cause and all matters in difference are referred, a recital in the award that the action was referred, without mentioning other matters in difference, does not constitute an objection to the award on the face of it.

Such an objection should be made the ground of a separate application to set aside the award, supported by affi-

SMIRKE shewed cause against a rule, which had been obtained by *Follett*, for an attachment for non-performance of an award. It appeared from the affidavits that an action of debt had been commenced upon the award, and that an appearance had been entered to it; and it was objected that the plaintiff, by commencing an action, had elected to adopt that remedy, and that the Court would not interfere now by summary process, and expose the defendant to the vexation of two separate proceedings. And for this was cited *Badley v. Loveday (a)*, where the Court of *Common Pleas* refused to grant an attachment for non-performance of an award pending an action brought on the award, or to allow the plaintiff to waive the action, in order to apply for the attachment; and the case of *Nichols v. Charlie (b)*, to the same point. The affidavits further stated, that no authority had ever been given that the Judge's order should be made a rule of Court; and that the attorney in consenting to it had acted without authority. An objection was also made to the award, that the submission being of all matters in difference, the award appeared to be only respecting the matters in the cause; for it com-

that this case was different from that of *Badley v. Loveday*; and he objected that it did not sufficiently appear that an action was now depending on the award. It was sworn that a writ of summons in an action of debt on the award had been served, and an appearance entered; but it would not appear from the writ, upon what award the action was brought; and no declaration had been delivered, though the writ was issued in *April*, 1832. Here, there has been a demand of the money due on the award before the action was commenced, and therefore the defendant has been guilty of a contempt. There is no case in the books where a party has distinctly refused to pay after a demand made before action brought, as is the case here. There is no reason why the plaintiff should not be at liberty to avail himself of both remedies, though he may not be entitled to use both at the same time; his merely commencing an action cannot deprive him of his right to proceed by attachment, if he should think fit. *Badley v. Loveday* is the only authority against the plaintiff, and the Court there considered the plaintiff had made his election; but there are other decisions in which the Court considered it discretionary in them whether they would grant an attachment after an action had been brought, or not. *Stock v. De Smith*(a); and an anonymous case in *Andrews's Reports*(b), where the Court granted a rule for an attachment on the plaintiff's undertaking to discontinue his action.

Lord LYNDHURST, C. B.—If the plaintiff had discontinued his action, and paid the costs before applying for this attachment, the application would have been perfectly regular; and I think this rule should be absolute upon the terms of the plaintiff's discontinuing the action, and paying the costs.

(a) Cas. temp. Hardw. 106.

(b) Page 299.

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BAYLEY, B.—With regard to the objection that has been made to the award, there is merely a mis-recital; and, in order to sustain such an objection, the party should have come to the Court to set aside the award, and should have shewn that there really were other matters in difference which were not decided upon by the arbitrators. In *Thornton v. Hornby*, there was a doubt as to the validity of the submission. With respect to the order having been made a rule of Court without the defendant's consent, it might be done without his consent; his attorney consented for him. Upon the other point—a demand having been made, the defendant ought to have complied with it; and the plaintiff having two remedies is not under the circumstances deprived of his right to apply here, subject to the payment of costs, as the Court may think proper.

GURNEY, B.—I think both remedies ought not to be pursued at the same time.

Rule absolute: the plaintiff discontinuing the action, and paying the costs (a).

(a) A party is entitled to an action by due course of law, but ter; but the Court refused the motion, and said that the instance

ecution on the judgment, the Court discharged the attachment. It is said in Tidd, (9th ed.) p. 834, that "when the submission is by rule of Court originally, or by order of *Nisi Prius* or agreement, which is afterwards made a rule of Court, the party disobeying an award is not only liable to an action, but also to an attachment as for a contempt; but this must be

understood to be intended with reference only to the choice of remedies which the party has, and not as to his right to pursue both simultaneously; and the authorities cited do not warrant any other than that construction, which is also confirmed by the mode in which the result of the authorities is stated by the learned author in the previous page (833).

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JOHNSON and WOODFALL, Assignees of COCKRANE, a
Bankrupt, v. MARRIAT.

W. H. WATSON, in the last term, obtained a rule *nisi*, calling on the defendant to shew cause why an order of *Bayley*, B., appointing *Cyrus Jay* attorney for the defendant, should not be discharged; and why *Cyrus Jay* should not be restrained from acting as attorney for the defendant in this cause; and why *C. Jay* should not, on notice being given to him, pay the costs. On the last day of the term the rule was enlarged, the defendant being

An attorney who has been employed by one party in a cause, and then discharged, is not on that account prevented from acting as attorney for the opposite party, unless some case of misconduct is made out against him.

A party upon whom the rule does not call is not obliged to appear and shew cause, because he is served with the rule; and if he does, the Court will not give him his costs of appearing.

Where a rule is enlarged from *Trinity* Term to *Michaelmas* Term, affidavits filed a week before the latter term are in time.

Bompas, Serjt., for the defendant.—The rule so far as regards *Cyrus Jay* is irregular, for he is not before the Court. With respect to the merits of the case, I admit that an attorney has no right to withdraw and go over to the other side. The ground of the motion is, that Mr. *Jay* was at first concerned for the plaintiffs. The facts are shortly these:—A commission of bankrupt having issued against *Cockrane*, the bankrupt, in *May*, 1832, Mr. *Jay* was employed by the assignees as their attorney. In *Michaelmas* Term an action was commenced by the assignees to recover part of the bankrupt's property. In *March* the plaintiffs voluntarily changed their attorney, and employed

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James Taylor; and therefore, having taken the proceedings out of Mr. *Jay's* hands, the plaintiffs cannot object to his acting for the other side. It is sworn in support of the rule, that Mr. *Jay* was consulted about the action; but that is denied. No case of misconduct is made out against him, or that he had refused to proceed, &c. The defendant has a right to employ an attorney, though he has been discharged by the plaintiffs. In *Cholmondeley v. Clinton (a)*, the attorney was not discharged, but voluntarily retired; and in *Grissell v. Peto (b)*, the Court of *Common Pleas* refused to restrain the defendant's attornies from acting in the cause, on the ground that they had obtained a knowledge of the plaintiff's case in the course of a *Chancery* suit in which they had been acting in conjunction with the plaintiff, and in which the defendant had no interest; the defendant's attornies deposing that, in that suit, they acted also for the defendant. It might be a matter of the greatest inconvenience in a country town where there might be only two attornies, if one party, after employing one of the attornies, might voluntarily discharge him, and thereby prevent his being employed by the other side. It is also alleged, that there was a case laid before counsel, but that we say was done by a Mr. *Peart*. *Beer v. Ward (c)* only

Mansel for Jay.—Mr. Jay ought to have been made a party to the rule; but, as he has been served, he is compelled to appear to take the objection. He is interested in the rule, though the Court cannot make an order upon him; for if this rule had been made absolute in the terms prayed, he would have been displaced. He cited *Wood v. Critchfield* (a).

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BAYLEY, B.—No rule would have been made affecting Mr. Jay without hearing him. At present he is not called on, and cannot be heard. In aid of Captain Marriat, he might have filed any affidavit he chose.

Watson, in support of the rule.—The action was brought by the assignees to recover from the defendant money levied by him on the bankrupt. The opinion of counsel was taken on a case. Mr. Jay commenced the action, delivered the declaration and the issue. It is said that the case was got from a Mr. Peart; but it is dated after Mr. Jay had been appointed attorney; and at all events the facts of the case must have come to his knowledge, even if he did not prepare it. He says, that, whilst he acted as solicitor, he was never consulted by the assignees; and that during all the period of his being employed he was not further acquainted with the case than is disclosed in the declaration. In *Cholmondeley v. Clinton* (b) it was held, that an attorney or solicitor could not give up his client and act for the opposite party in any suits between them. Confidential communications cannot be divulged by an attorney in the witness box, whether he has been dismissed from caprice or otherwise. In *Evitt v. Price* (c) an injunction was granted to restrain the disclosure of secrets which had come to the defendant's knowledge in the course of a confidential employment. Every client ought to be free to

(a) 1 Dow, P. C. 587.

(b) 19 Ves. 261.

(c) 1 Sim. 483.

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employ or change an attorney. Mr. *Jay* was consulted in the action, the bankrupt attended him, and being advised that an action would lie, Mr. *Jay* commenced and carried on the proceedings; that is not denied. With respect to the rule, Mr. *Jay* has not been taken by surprise; he has had the whole vacation to file affidavits in.

BAYLEY, B.—It is a general rule, that if a rule is enlarged from *Trinity* to *Michaelmas* Term, if the affidavits are filed a week before *Michaelmas* Term, that is sufficient.

Watson.—Mr. *Jay* must have been well aware of the meaning of the rule. Mr. *Price* applied last term to enlarge it, and then Mr. *Jay* appeared by counsel, and the enlarged rule was drawn up so: he has since filed affidavits, and given notice that he should appear, and get the rule discharged with costs.

BAYLEY, B.—It appears to me that we ought not to make this rule absolute. In *Cholmondeley v. Clinton*, the party was restrained, because, by a private agreement, *Montrieu* agreed to withdraw; but it seems to have been the opinion of Lord *Eldon*, that, but for that agreement,

ther they have made any confidential communications. They neither of them join in any affidavit. Mr. *Jay* states he never had any instructions or communication from any party but *Johnson*. One ground for the application was contended to be, that Mr. *Jay* drew out a case, which he laid before counsel, and that it must therefore be supposed that Mr. *Jay* was fully acquainted with the facts of the case; but if the fact were so, it should have been so stated in the affidavits; but the only affidavits are by two persons of the names of *Taylor* and *Elliott*. Mr. *Elliott* says, it appears by the bill of costs of *Cyrus Jay*, that there had been an illegal seizure of the bankrupt's property by the defendant; that counsel's opinion had been taken that an action might be maintained, which was accordingly brought, and the issue was delivered by *Jay*, who gave notice of trial, and made two briefs of the pleadings; and then *Taylor* says he was appointed attorney in the room of *Jay*; and then follows a statement of summonses and correspondence about the appointment of *Taylor* and the payment of Mr. *Jay's* costs. It is not stated that Mr. *Jay* is in the possession of any material facts; it concludes by stating that *Cyrus Jay* having been attorney for the commission, and having advised with the plaintiffs and taken counsel's opinion, he is well acquainted with the facts of the case; but, if any material facts had been disclosed, they should have been stated, and also in what respect the case contained material or confidential information, which it would be a breach of confidence in the attorney to act upon, not generally that it did contain material information. If it had been stated that Mr. *Jay*, in his character of attorney for the plaintiffs, had become acquainted with facts essential to the plaintiffs' case, I should have paused before I discharged this rule; but they only draw their inferences from the bill of costs.

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BOLLAND, B.—I take the same view of the case. There

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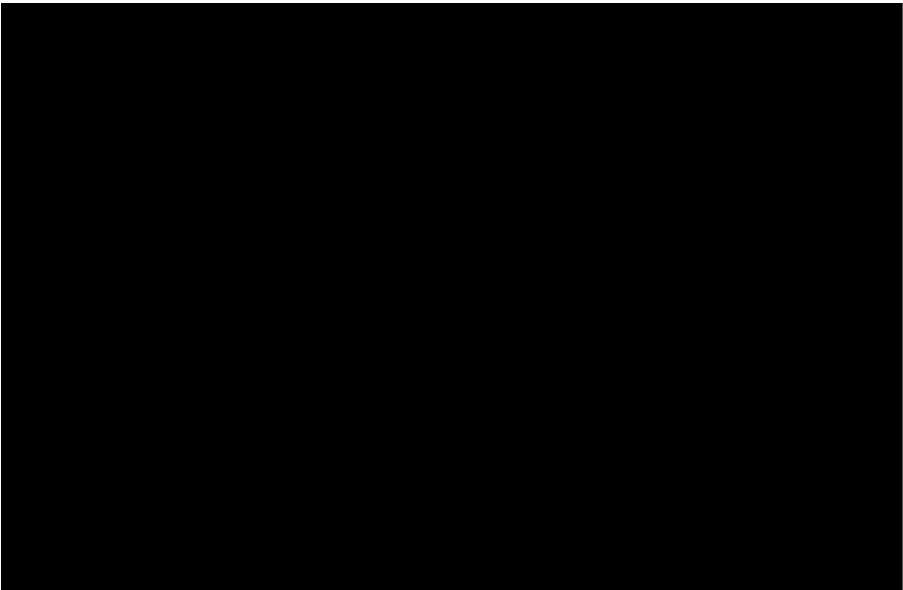
is no sufficient ground stated in the affidavit to warrant our interference. The defendant wishes to employ Mr. *Jay*: the plaintiffs say he ought not. But it appears to me that Lord *Eldon* thought that if a party discharged a man without good cause, he does so at his peril. We cannot restrain Mr. *Jay* from communicating with Captain *Marriat*, even if we restrained him from acting as attorney. Lord *Eldon* thought, if a client discharged his attorney from whom, or without just ground of complaint, the attorney was at liberty to go to the other side.

GURNEY, B.—I do not mean to say that in no case would the Court interfere, because an attorney may misconduct himself; but here there is no proof of misconduct.

Rule discharged, with costs.

Mansel for *Jay* contended, that he ought to have his costs of appearing.

BAYLEY, B.—We make no order as to them: we have treated Mr. *Jay* as if he was no party to this rule; though Mr. *Jay* had notice given to him, that does not make him a party to the rule.



1834.

EVANS and Others, Executors, v. TAYLOR.

THIS was an action for an attorney's bill of costs incurred in an action in the *Common Pleas* of *Taylor v. Evans*. The bill was in the usual way referred by order of a Judge to be taxed. The Master had referred it to the Prothonotary of the *Common Pleas*. It was contended before him, that *Evans*, the testator, had undertaken to do the business for costs out of pocket, and an affidavit of the plaintiff had been admitted by him to prove that fact, and the bill had been taxed upon that principle. *Ball* now moved to review the taxation, contending that the Master had no authority to go into the question of liability; that it was only of late years that a bill of executors had been allowed to be taxed; and that the Master had no power to release the defendant from his undertaking.

The Master, to whom a bill of costs is referred for taxation, has no power to inquire into the fact whether the business charged for was agreed to be done for costs out of pocket.

Alexander shewed cause in the first instance.—He contended that it was too late to take the objection, the Master having heard and determined upon the point; that it clearly appeared from the defendant's affidavit, that there had been such an agreement, and that the plaintiffs themselves had put in an affidavit before the Master in answer to the defendant's affidavit.

BAYLEY, B.—I think the Master has done what strictly he had no authority to do, and that the taxation should be reviewed.

Rule absolute.

1834.

PRIMROSE *v.* BADDELEY.

The rule that an application to set aside proceedings for irregularity must be made in a reasonable time, applies as well to the case of a prisoner as to other persons.

BUSBY (on *January* 14) moved to discharge a defendant out of custody, and to set aside the copy of the writ of *capias* for irregularity. The arrest was on the 4th of *December* previous. In answer to a question of *Bayley*, B., why the defendant did not apply in vacation, it was argued that it was not too late for a prisoner to apply, the defendant being still in custody, and no proceedings having been taken since the arrest.

BAYLEY, B.—His being a prisoner makes no difference. Unless there is an affidavit accounting for the delay, the rule must be refused.

Rule refused.

WILLIAMS *v.* WILLIAMS.

Where a verdict was obtained in the absence of defendant, on account of no notice of trial being given, the

R. V. RICHARDS having obtained a rule *nisi* for setting aside the execution issued against the defendant, and also the verdict given for the plaintiff in the Sheriff's Court of *Carnarvon*, on the ground of no notice of trial having

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WOOLLISON *v.* HODGSON.

THE defendant having paid his attorney a bill of costs, by giving a bill of exchange for the amount, on which the present action was brought, afterwards had the bill of costs taxed, and got a sixth part taken off, which entitled him to the costs of taxation. The attorney having paid away the bill of exchange, which was not honoured by the defendant when it became due—

An attorney having taken a bill of exchange from his client in payment of a bill of costs, but the bill of exchange not being paid, the attorney had been sued upon it, the Court allowed him to pay the costs of taxing his bill (more than a sixth having been taken off) to the holder of the bill, in part payment.

Hunfrey obtained a rule *nisi*, on behalf of the attorney, calling on the defendant to shew cause why he (the attorney) should not be at liberty to pay the costs of taxation to the holder of the bill in part payment of it, instead of paying them to the defendant.

Miller shewed cause.

The Court made the rule absolute.

BURLLEIGH *v.* KINGDOM.

THIS was a motion to set aside all the proceedings, unless 10*s.* should be refunded. The writ was indorsed for 20*l.* At the trial before the sheriff, the jury gave a verdict for 20*l.*, and 10*s.* for interest.

Where an action is tried before the sheriff, under the Writ of Trial Act, and the jury give 20*l.* for the debt, and 10*s.* for interest, *semble*, that the verdict is bad *quoad* the 10*s.*

Butt shewed cause, and argued that the verdict was right in point of law, and referred to sects. 17 & 28 of 3 & 4 *Will.* 4, c. 42.

BAYLEY, B.—You may be under some difficulty unless you remit.

The rule was discharged without costs, the plaintiff remitting the 10*s.*

1834.

JOHNSON *v.* WELLS.

Motions for new trials under the Writ of Trial Act, can only be made on an affidavit of the facts, or on the under-sheriff's notes, verified by affidavit; and the Court will not pay the same regard to the notes of the under-sheriff as they do to a judge's notes of a trial.

THIS was an issue tried before the sheriff of *London*, under the Writ of Trial Act(*a*), and the plaintiff obtained a verdict contrary to the direction of the secondary.

Stammers moved for a rule *nisi* to set aside that verdict, or to enter a verdict for the defendant, or a nonsuit. The action was for the price of goods; and the objection taken at the trial, and now renewed, was, that, as the plaintiff had made the contract as agent, he could not sue as principal. The invoice was made—"Bought of *Johnson & Cooke*—*J. H. Johnson*, Agent:" and *Bickerton v. Burrell*(*b*) was cited to that effect. The sheriff had certified that judgment ought not to be signed until the defendant had had an opportunity of applying to the Court.

BAYLEY, B.—How can the sheriff save the point? We cannot enter a verdict for the defendant.

Stammers.—Then I move for a new trial: the plaintiff refused to be nonsuited.

The Court having granted a rule *nisi* for a new trial—

act is not in the situation of a judge. We should be getting rid of all rules if we were to allow applications to the Court, without any affidavits to ground them upon. There is no affidavit of the facts, nor of the certificate of the secondary, nor are the notes verified by affidavit. As this is an application on a new act, and the defendant may have been misled, we will grant leave to the defendant to make a fresh motion upon proper materials, upon payment of costs, and bringing the money into Court.

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The rest of the Court concurred.

Rule discharged.

Note.—It has since been intimated from the bench, that, in order to save expense, the Judges have agreed to allow motions for new trials, under the Writ of Trial Act, to be made upon producing the under-sheriff's notes, verified by affidavit.

GROOMBRIDGE v. FLETCHER.

THIS was an action by a landlord against the sheriff for misconducting a sale of the tenant's property, whereby he lost the amount of the rent due to him. The rent due was 45*l.*, but the sale only produced 25*l.*

In an action by a landlord against the sheriff, the Court refused to allow the proceeds of the sale to be paid into Court with the costs of the action, though it was sworn that the sale was regularly conducted.

Alexander, on behalf of the defendant, moved for a rule for paying into Court the 25*l.*, which was still in the sheriff's hands, with the costs up to the present time. There was an affidavit that the sale was conducted in every respect in a proper manner. The object of the rule was to save further expense.

Lord LYNTHURST, C. B.—The plaintiff says that the defendant acted wrongfully; and he has a right to try that

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 GROOMBRIDGE
 v.
 FLETCHER.

question. The sheriff either has a defence, or he has not : if he has, there is no occasion for this motion ; if he has not, he has no right to it.

BAYLEY, B.—The saving of expense would be a ground for a similar motion in every action.

Rule refused.

READ v. COLEMAN.

A party who holds an agreement of which there is only one part, is bound to give a copy to the other side, without imposing any terms. An application for a copy of an agreement ought to be made to a Judge at chambers, and not to the full Court.

THIS was an action by a tenant against his landlord. The plaintiff held under an agreement, of which there was only one copy, which was in the defendant's hands. The plaintiff demanded a copy of the agreement, but the defendant refused, unless the plaintiff would admit the handwriting, and agree to refer to one of six barristers named by the defendant. *Knowles* having obtained a rule *nisi* that the defendant should deliver a copy and produce the original at the Stamp-office to be stamped—

Alexander shewed cause, and said that he should not have opposed this rule unless costs had been demanded ;

1834.

STEVENS v. PELL.

THIS was a rule which had been obtained by *Follett*, for setting aside the writ of inquiry and all subsequent proceedings for irregularity. The question was, whether the defendant was entitled, under the circumstances, to fourteen days' notice of inquiry. The venue was laid in *London*, but the defendant lived more than forty miles from *London*. There had been a demurrer to the plea, which was argued on the 13th of *November*, and judgment given in favour of the plaintiff. On the 14th, notice was given that a writ of inquiry would be executed on the 22nd. On the 20th, the defendant gave notice that he meant to apply to the Court to set aside the notice of inquiry, but did not specify the objection. The trial took place on the 22nd, and on the 23rd the rule *nisi* was granted by this Court. The defendant had had time to plead on the usual terms of pleading issuably, rejoining gratis, and taking short notice of trial.

A defendant, who is under terms to take short notice of trial, is not bound to take short notice of inquiry.

A defendant, to whom an irregular notice of inquiry is given, ought to return it forthwith, and state what objection he has to it.

Where a notice of inquiry was given, with eight days only instead of fourteen, and the defendant, instead of returning it, merely gave notice, after the lapse of six days, that he intended to apply to set it aside, without stating the objection, the Court, on making the rule absolute for setting aside the inquiry, refused costs.

Humfrey shewed cause, and contended, for the plaintiff, that the defendant, being under terms to take short notice of trial, was not entitled to fourteen days' notice of inquiry, and that eight days were sufficient; that if the defendant objected to the notice of inquiry, it was his duty to have returned it, which was the invariable practice; and that there was no reason why a party should be entitled to full notice of inquiry when he was only entitled to short notice of trial. Where the defendant resides is a matter peculiarly within his knowledge, and he ought to have informed the plaintiff of it; and it is sworn by the plaintiff's attornies' clerk that he did not know that the defendant lived more than forty miles from *London*. It was further contended that the application was too late, and that the defendant ought not to have laid by till all the expense was incurred in executing the inquiry, and

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afterwards obtain a rule at the end of the last term, drawn up for the present. He should have applied to set aside the notice. He cited *Lloyd v. Hooper (a)*, where it was held that a defendant, who was residing at an hotel in town from the time of his arrest till he was served with notice of executing a writ of inquiry, was not entitled to more than eight days' notice in a town cause, though his general residence was more than forty miles from town. Besides, there is no affidavit of merits.

Follett, in support of the rule.—As to the last point, the defendant lives in *Northamptonshire*; and it is not shewn where he was served. This was a special action on a guarantie, and therefore we could not swear to merits: and it ought to appear, on the other side, that they were ignorant of the defendant's residence; but it is merely sworn by the attornies' clerk, who does not appear to have been the managing clerk, or knew any thing of the cause; and the inference is, that the fact was known to them, and that they relied upon the defendant's not having returned the notice. But there is a positive rule of Court, which is inflexible, that, where a defendant lives forty miles from *London*, he is entitled to four-

There is an express rule, that, where the defendant lives forty miles from *London*, he is entitled to fourteen days' notice. In strictness, therefore, he is entitled to the whole time. The Master says, that where the defendant objects to the notice, on the ground of its not giving a sufficient time, the practice is to return it, and tell the plaintiff that the defendant lives forty miles off, because it lies peculiarly within his own knowledge. If it had appeared satisfactorily from the affidavits that the plaintiff knew that the defendant lived forty miles from *London*, or that he was served more than forty miles off, the case would have been more favourable for the defendant; but, upon the whole, I think the inquiry ought to be set aside without costs, for the defendant must have known that the plaintiff would act on his notice; and the defendant only says there is an irregularity, but does not point it out.

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GURNEY, B.—One of the usual terms now is to take short notice of inquiry when necessary.

The rest of the Court concurred.

Rule absolute, without costs.

RYALLS v. EMERSON.

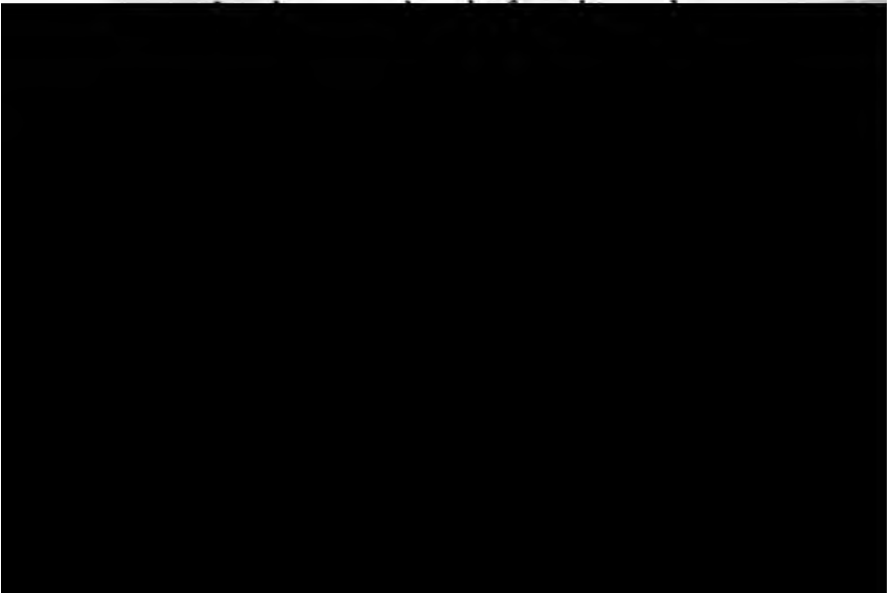
THIS was an action brought by an attorney for his bill of costs. A summons was taken out by the defendant for staying the proceedings and for having the bill taxed; and *Vaughan*, B., made an order thereupon: but the order did not contain in it the usual undertaking by the defendant to pay what was found due by the Master,

Where an action was brought by an attorney for his bill of costs, and the defendant obtained an order to tax the bill, but which order did not contain any direction to the defendant

to pay what was due, though he signed the usual consent in the Judge's book, and another order was afterwards made for reviewing the taxation, which also contained no direction to the defendant to pay what was due, and the Master found a sum of money to be due to the plaintiff, who made the latter order only a rule of Court:—*Held*, that an attachment obtained thereon was irregular, as it did not contain any order on the defendant to pay.

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nor did it order the defendant to pay what was due; but merely, "that, on payment of what was found due by the Master, proceedings should be staid." The defendant, however, had signed the usual consent in the Judge's book. The order also directed credit to be given for money received on account. The Master found that the plaintiff had been overpaid by 6*d*. A summons was then taken out for setting aside the Master's *allocatur*, and for reviewing the taxation; and Mr. Baron *Bolland* made an order for the Master to review his taxation; but it did not direct the defendant to pay what should be found due. The Master reviewed his taxation, and gave his *allocatur* to the plaintiff for 18*l*. The latter order and *allocatur* were made a rule of Court; and a demand of the money was regularly made and refused. Immediately after the second *allocatur*, the defendant pleaded to the action. The plaintiff then obtained an attachment against the defendant for not paying the 18*l*. pursuant to the order and *allocatur*. *Heaton* thereupon obtained a rule *nisi* for setting aside the attachment, on the ground that the Judge's order should have contained in itself a direction to the defendant to pay what was due, or a consent by the defendant to that effect; and that there was no contempt,



BAYLEY, B., observed that it would be very dangerous to make a distinction between an order to review and any other order.

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The Court took time to consider; and afterwards judgment was delivered by—

BAYLEY, B.—We think the attachment in this case was obtained on insufficient materials. There must be a rule of Court. In this case there was a rule of Court, which recited one order, and one order only. There was an order of Mr. Baron *Vaughan* for referring the bill to taxation, but without any direction to pay according to the 2 *Geo. 2*. There was a submission to pay in the Judge's book; but that order and that submission were not made a rule of Court, but only Mr. Baron *Bolland's* order that the Master should review his taxation: only the latter order was served, and a demand made upon it; but that order did not shew the terms of the previous order; therefore, we think the materials are insufficient. It was pressed to be against good faith; but that objection is not well founded. On the 16th of *January*, the attachment was granted: on the same day there was a motion to set aside Mr. Baron *Bolland's* order. At the time of granting the attachment, the Court thought it reasonable that the party should have time to pay the money; but it was objectionable at that time, and there was no waiver of any objection. We therefore think the rule should be absolute, without costs.

Rule absolute.

1834.

EVANS *v.* PUGH.

An action having been commenced against a surety on a promissory note, he agreed, that, if the plaintiff would take proceedings against the principal, he (the surety) would pay the extra costs occasioned thereby; the plaintiff having done so, afterwards issued execution against the surety for the balance due on the note, and also the extra costs; the Court ordered the execution to be reduced to the extent of the costs included in it.

THIS was a rule obtained by *W. H. Watson*, calling upon the plaintiff to shew cause why the execution should not be reduced from the sum of 240*l.* to 209*l.* In 1829, the plaintiff sold goods to one *Thomas* to the amount of 300*l.*, in payment of which *Thomas* gave him a promissory note, and the defendant *Pugh* and another person joined him in it as sureties. Separate actions were afterwards commenced against the three. In the execution issued against the present defendant it was alleged that 31*l.* were for extra costs incurred in the action against *Thomas*.

Whitcombe shewed cause upon an affidavit, which stated that the defendant had expressly promised that he would pay any extra costs which might be occasioned by the plaintiff's proceeding against *Thomas*; and that the execution issued against him had been unproductive.

BAYLEY, B.—That is a collateral agreement, upon which you must sue. You cannot issue execution in this action for costs incurred against another defendant.

which the client had accepted a bill of exchange; but it appeared that the 26*l.* was given by the defendant to his attorney for the purpose of paying the debt and costs in the above action; and it was therefore contended that the attorney ought not to have made it part of his bill. The Master taxed off 6*l.* 16*s.*, which was more than a sixth, if the sum of 26*l.* was not properly included in the bill; and Mr. Baron *Bolland* made an order on the attorney to pay the costs of taxation, as if more than a sixth had been taken off. It was now contended that that order was irregular, as there was not a sixth taken off the whole bill.

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WOOLLISON
v.
HODGSON.

BOLLAND, B.—There was a case in the *Common Pleas*, of *Taylor v. Shackleton*, where the attorney had received 65*l.* to pay counsel's fees at the assizes at *York*, and it was held that that sum was properly made an item in the bill; but I thought there was a distinction between the cases: here, the debt and costs was a sum specifically received and paid.

BAYLEY, B.—It is not properly part of the bill, with the view of ascertaining what is due on taxation. A sum of 26*l.* is paid to the attorney, and by him paid over to another person. That is not a taxable item.

Humfrey.—The act requires a bill of fees and disbursements. In *Taylor v. Shackleton* the money was paid to the attorney, to be by him paid over to another.

GURNEY, B.—There the fees were part of the costs in the cause. Here the cause was at an end, and the money could have been paid at once to the other side.

Rule refused.

1834.

STREETER v. SCOTT.

Where the principal and bail both became bankrupts, the Court ordered them to be relieved on motion, without pleading, though the bail-bond had been ordered to stand as a security. In such case the bail must swear they have obtained their certificates.

WIGHTMAN shewed cause against a rule which had been obtained by *Humfrey*, for cancelling the bail-bond, and entering an *exoneretur* on the bail-piece, on the ground that the defendant and the bail had all become bankrupts. Before the bankruptcy of the principal, the bail had been allowed to stay proceedings, on the terms of the bail-bond standing as a security. Since which, a verdict for 300*l.* had been obtained against the principal. It was contended that the bail having been fixed before the allowance of the certificate, the bail were not discharged.

BAYLEY, B.—That is where the principal has become bankrupt; but here they have become bankrupt themselves. But the bail only swear they have become bankrupts; they ought to swear they have obtained their certificates.

The rule was enlarged for that purpose, the bail paying the costs; and, on a subsequent day, that fact having been supplied by affidavit, the rule was still opposed by—

BAYLEY, B.—When the bail-bond is ordered to stand as a security, you declare. If you could not prove, you might have made a claim; *certum est quod certum reddi potest*, and you are now entitled to prove. The bankruptcy of the bail took place subsequently to the time when the bail-bond was forfeited, which gave a cause of action on the bail-bond. The direction to stand as a security does not vary the case, it only extends the time. There is a clause in the act, that a bankrupt, who, after having obtained his certificate, is arrested for a debt proveable under the commission, may apply to the Court for his discharge, and may plead the bankruptcy in bar. If you could impeach the commission, that would make a difference. You have no cause of action against the bail, that would not be barred by the certificate.

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STREETER
v.
SCOTT.

Wightman.—Suppose this was an action on an ordinary bond.

BAYLEY, B.—The declaration here is on a bail-bond, and that is quite sufficient.

Wightman.—This rule calls upon us to shew cause why the bail-bond should not be delivered up to be cancelled.

BAYLEY, B.—We can mould the rule; the proceedings may be stayed, and an *exoneretur* entered on the bail-piece. The bail below are parties to the bail-piece. The rule goes too far in asking to have the bail-bond cancelled, though that is virtually included in it; it will be absolute, without costs.

VAUGHAN, B.—They are entitled to this rule *ex debito justitiæ*.

Rule absolute.

1834.

FIGGINS *v.* WARD and Others.

Where several
suffer judgment
by default in
an action on a
promissory
note, service of
the rule *nisi* on
one is service on
all.

THIS was an action against three defendants on a promissory note. Judgment by default having been obtained, and a rule *nisi* to compute, *Halcomb* moved to make the rule absolute on an affidavit of service on *Ward*, one of the defendants, who was an attorney, by leaving a copy with him; and, at the same time, two other copies were left with him for the other defendants; but, he said, a doubt had been entertained whether there was a sufficient service as to the other two.

BAYLEY, B.—By suffering judgment to go by default, they acknowledge a joint cause of action, and that *quoad hoc* they are partners: service, therefore, on one is good for all.

Rule absolute.

EVANS *qui tam v.* MOSELEY, Esq.

A bail bond
conditioned to
appear in eight
days after the

THIS was an action brought against the defendant, as sheriff of *Shropshire*, for not accepting a bail-bond. A

warrants shall require," the condition of the bond, which was proved to have been tendered, ought to have been in that form; but the condition was to appear and put in bail in eight days after the date of the bond. They cited *Rogers v. Reeves* (a), and *Scott v. Marshall* (b). The condition ought to have been to appear at the return of the writ, or it ought to have appeared by recital that the day of the arrest and the day of the date were the same. It was further contended, that there was a variance in stating the bond in the declaration as with a condition to appear in eight days after the arrest, when the bond produced in evidence was conditioned to appear in eight days from the date. It should have been alleged that both days were the same.

1834.

EVANS
q. t. v.
MOSELEY.

BAYLEY, B.—It is not contended that the Uniformity of Process Act repealed, or was intended to repeal, the 23 Hen. 6. The latter act required the bond to be given for a certain day, and imposed a penalty on the sheriff for not letting out a party on bail to keep his day. By a subsequent act, a new day of appearance is given; the old act remains therefore with the new day. The act of 2 Will. 4, c. 39, requires the defendant to appear in eight days after the execution of the writ, inclusive of the day of execution; that is in fact eight days from the date: and what was the date of the bond and the return of the writ appeared in evidence; the sheriff must know the day of the arrest, because he executes the writ. As to the variance in the declaration, it was proved that the day of the date of the bond and the day of the arrest were the same; there was therefore no variance.

The second point was very fully argued upon the general nature and quality of a *subpœna*; but it has been

(a) 1 T. R. 421.

(b) 2 Cr. & Jer. 238; S. C. 2 Tyrw. 257.

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MOSELEY.

thought sufficient to give only the judgment of the Court delivered on the following day.

BAYLEY, B.—There was a question raised in this case, whether a bailiff having been called to produce a warrant had a right to claim to be sworn, or whether the plaintiff could insist on his producing the warrant without being sworn. Several *Nisi Prius* cases were cited, and we have consulted the Judges of the other Courts: the result of that consultation is, that we think the *Nisi Prius* cases were rightly ruled, and that the officer was bound to produce the warrant without being sworn—the party calling him not being under any legal obligation to put a question. The general rule having been discussed, and it being of importance that there should be one general rule upon the subject, we have thought it better to decide the point. The origin of the *subpœna duces tecum* does not appear: there is no instance of it prior to the time of *Charles the Second*; but without doubt there must previously have been *subpœnas* in use requiring the attendance of witnesses, and that they should produce documents: and, before the statute of *Elizabeth* requiring the attendance of witnesses, there was a common law right in the Crown to issue a *subpœna* requiring a party to produce documents—not a *subpœna ad*

BATES v. PILLING.

1834.

ALEXANDER shewed cause against a rule which had been obtained by *R. V. Richards* for taxing the defendant his costs, under the 43 *Geo. 3*, c. 46, s. 3, he having been arrested for 24*l.*, and the arbitrator to whom the cause was referred at the *York* assizes having awarded only 13*l.* He objected that it did not appear from the defendant's affidavits that he had been arrested; it was merely stated that he was held to bail; and, from the plaintiff's affidavit, it appears not only that there was no arrest, but that the writ was not served, though special bail was put in. The words of the act are, "*arrested* and held to bail, &c." In *Berry v. Adamson* (a), where a sheriff's officer, to whom a warrant upon a writ against *A.* was delivered, sent a message to *A.*, and asked him to fix a time to call and give bail, and *A.* accordingly fixed a time, attended, and gave bail; it was held that this was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action. In *Amor v. Blofield* (b), *Berry v. Adamson* was recognised and confirmed; and it was there held, that where, upon a bailable writ, the defendant is not actually arrested, but files common bail in consequence of a defect in the affidavit to hold to bail, he is not entitled to costs under the 43 *Geo. 3*, c. 46, upon the plaintiff recovering less than would have entitled him to proceed by bailable process. All the Judges were of opinion that there must be an arrest. In *Donlan v. Brett* (c), *Parke, J.*, said, "We are bound to decide according to the words of the act of Parliament."

To entitle a defendant to apply for costs under the 43 *Geo. 3*, c. 46, s. 3, a mere holding to bail is not sufficient—there must be an arrest and holding to bail.

R. V. Richards, in support of the rule.—Whether the

- (a) 9 Dowl. & Ryl. 558; 6 B. Bing. 91.
 & C. 528; S. C. 2 Car. & P. 503. (c) 10 B. & C. 119.
 (b) 2 M. & S. 156; S. C. 9

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facts bring this case within the relief given by the act, it is certainly within the mischief. Here aailable writ was issued, bail was required, and a bail-bond given. If the arrest here had been for 2000*l.* instead of 20*l.*, if the words are imperative, the defendant could have no relief. If an actual arrest is necessary, then a detainer would not be within the act.

BAYLEY, B.—A detainer is an arrest.

Richards.—In *Amor v. Blqfield* only a writ was sued out, and an undertaking given: it was illegal for the sheriff to take it; he afterwards took a bail-bond. There is some analogy to the stat. of 4 & 5 *Anne*, c. 16, s. 20. In the late case of *Taylor v. Clow (a)*, the question was, whether, when there was no arrest, a bail-bond could be taken. The words of the statute of *Anne* are, “if any person shall be arrested, and bail is taken by the sheriff, he shall assign;” but it was held that the bail could not impeach the bail-bond by pleading that there was no arrest.

BAYLEY, B.—The giving a bail-bond is the defendant’s own act. *Taylor v. Clow* was an action on a bail-bond; and it was held that the defendant was estopped from

want to go further, and visit the plaintiff penally. The title of the act is, "An Act for the more effectual prevention of frivolous and vexatious arrests and suits." The words of the clause are "arrested *and* held to bail:" those words either mean something different, or else the same; and, in the latter case, one expression is nugatory. In the latter part of the clause the same expression occurs again, "Provided that it shall be made appear to the satisfaction of the Court, that the plaintiff had no reasonable or probable cause for causing the defendant to be arrested *and* held to bail." As to the case of *Berry v. Adamson*, and *Amor v. Blofield*, I agree you may put some oppression upon a party if there is no arrest; but if the words are not synonymous, then an arrest is one thing, and holding to bail is another; here, there was a holding to bail but no arrest. *Berry v. Adamson* treats them as distinct things. There, the officer sent a message to the defendant that he had a writ against him, and requested him to attend at the officer's house and give a bail-bond; the defendant did so; he was put to the trouble of getting bail and giving a bail-bond; and he might have been taken by his bail at any time. Lord *Tenterden* says, this is not an arrest, and that an action for a malicious arrest would not lie; but malice is now not necessary. In that case you had the opinion of the Court of *King's Bench*, that holding to bail is not sufficient without an arrest. In *Amor v. Blofield* the party was never actually arrested, and only held to common bail; the judgment went much beyond what was necessary. The Chief Justice says, "The defendant does not fall within the description of persons entitled to costs under the 43 *Geo. 3*, c. 46; here, there was neither arrest nor a holding to bail, the defendant, therefore, has not been subjected to the inconvenience of an unjust arrest." Mr. Justice *Bosanquet* says, "The application being founded on a statute, the party ought to bring himself within the terms of that statute; but he has neither been arrested nor held to


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bail." All the Judges negatived both propositions, as if they considered them different things; and you must bring yourself within both, otherwise you do not make out a case within the act.

VAUGHAN, B.—I think, that, on the spirit and letter of the act, the defendant is not entitled to the rule prayed for. It is said, that "and" is sometimes construed "or." The introductory part of the clause is in the alternative, no person shall be arrested or held to bail; but, in the subsequent part of the clause, the expression "and" occurs twice. The act is remedial in some respects, but in others highly penal, and ought not to be departed from except in cases of evident necessity. As to the statute of *Anne*, respecting the assignment of a bail-bond, it could make no difference whether the defendant was actually arrested or not.

BOLLAND, B.—I think there ought to be both an arrest and a holding to bail, according to the express terms of the act. The act is penal, as it regards the plaintiff. The case of *Amor v. Blofield* is certainly not decisive; but, from the opinion delivered by the Court, it may be collected, that they considered that the merely giving a bail-



Ex parte GARRATT.

1834.

MANNING applied to the Court to re-admit an attorney of the name of *Garratt*.—This gentleman was admitted an attorney in the Court of Great Sessions in 1823, and took out his certificate for that year and commenced practising; but, before the expiration of the year, having married, he left the profession, and wholly discontinued practice. At the end of last year, wishing to recommence business, he sent instructions to an agent in town to get him admitted in the Court of *Exchequer*, and he was told he must produce his admission in the Court of Great Sessions, and get it inrolled, which he did; and he was then admitted. Upon applying to be admitted in the Courts of *King's Bench* and *Common Pleas*, the officers of those Courts thought that some evidence, to shew that he had been practising at the time of the passing of the 11 *Geo. 4* & 1 *Will. 4*, c. 70 (*a*), was necessary.

An attorney of the Court of Great Sessions in *Wales*, who had once been in practice, but had discontinued practising for more than six months before the passing of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, was held not to be entitled to be admitted under that act.

BAYLEY, B.—Upon applying to this Court for admission, he suppressed the fact of his having discontinued to prac-

(*a*) Sects. 15 & 16, by which it is enacted, "that all persons who on or before the passing of this act shall have been admitted as attornies, and shall then be practising in any of the Courts of Sessions or Great Sessions in the county palatine of *Chester* or in *Wales* respectively, shall be entitled, upon the payment of one shilling, to have their names entered upon a roll to be kept for that purpose in each of the superior Courts of *Westminster*, and thereupon be allowed to practise in such Courts in all actions and suits against persons residing at the commencement of the suit within the county of *Chester* or

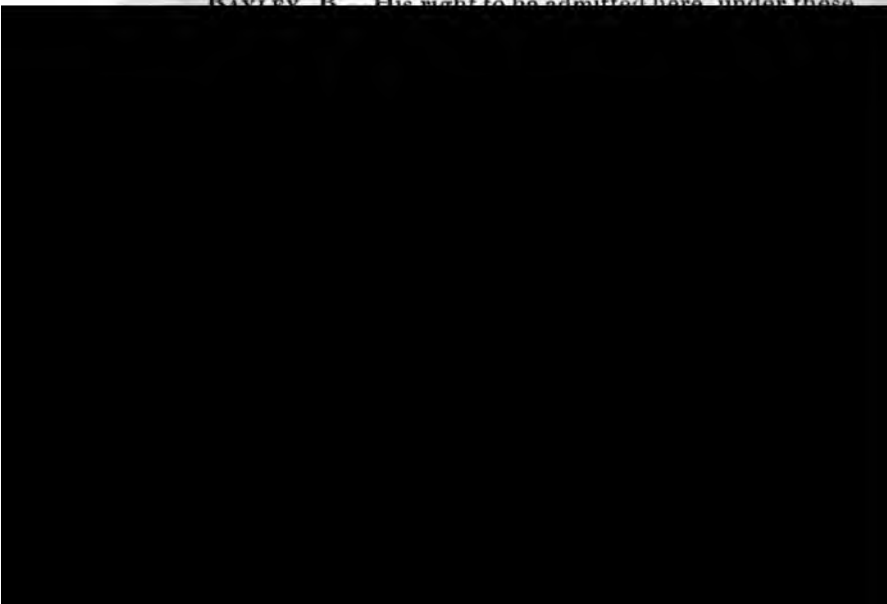
principality of *Wales*; and that all persons having served or now actually serving as clerks to such attornies under articles, and who would otherwise be entitled to be admitted as attornies of the said Courts of Great Sessions, may, on or before the expiration of six months after the passing of this act, be admitted as attornies of the said courts at *Westminster*, for the purpose of practising there in the like matters only, without payment of any greater duty than would be now payable by law upon their admission as attornies of such Courts of Great Sessions respectively."

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—
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tise: it will be necessary for him to exculpate himself from the appearance of a fraud practised upon the officer of this Court.

Manning, on a subsequent day, produced an affidavit disclaiming, on the part of the applicant, any intention of fraud: that he was not aware that his having ceased to practise would make any difference; and that the officers of the Court had not put any questions upon the subject. He said it had been objected that the statute only applied to persons who had not been admitted, or who were practising at the passing of the act; but if that were so, a party guilty of no default would be unjustly deprived of his right to be re-admitted, except upon the terms of again paying the duty to the full extent; and he contended that this case differed from *Ex parte Read (a)*, where it was held that one who had been admitted an attorney, but had not actually practised in the Court of Great Sessions before the passing of the 11 *Geo. 4 & 1 Will. 4*, c. 70, was not entitled to be admitted, under that act, as an attorney of the Court of *King's Bench*. Here the applicant had been in actual practice.

BAYLEY, B. His right to be admitted here, under these



1834.

DOE *d.* GREEN and Another *v.* PACKER.

THIS was a motion on the part of the defendant to stay proceedings until the costs of a former ejectment were paid. There had been a previous ejectment between these parties, in which the now defendant was the lessor of the plaintiff, and the present lessor the then defendant. That ejectment was brought in *May* last; and at the assizes, in *July*, judgment passed by default, and a writ of possession was immediately executed. Since which an action was brought for the mesne profits, to which the general issue had been pleaded. On *September* 30th, the declaration in the present ejectment was served. The present motion was made on the fifth day of the term; but there had been a previous unsuccessful attempt by summons before *Vaughan*, B.; since which notice of trial had been given in this cause.

A motion to stay proceedings in a second ejectment till the costs of a former one had been paid:—*Held*, to be in time, though a term had elapsed since the action was commenced and notice of trial had been given.

Alexander shewed cause.—He contended that the motion was too late, especially after notice of trial; and that it would be a great hardship to impose such terms upon the present plaintiff, who was a poor man, and where the merits were not tried in the former action.

Tyrvohitt, in support of the rule.—The *venue* is in *Berkshire*, and the notice of trial, therefore, could not expedite the proceedings.

BAYLEY, B.—I think the motion was not made too late: the notice of trial could only have been given to prevent the motion. It is the constant course, without exception, that, where a party to an ejectment fails, he is not at liberty to bring another ejectment without paying the costs of the first, unless under very special circumstances. It does not appear that the lessor is unable to pay, but he merely says he apprehends he shall lose his future costs if he succeeds:

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DOE
d.
GREEN
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PACKER.

that might be prevented by paying the costs into Court, but then they would probably be found to be subject to a lien, and could not be set off.

GURNEY, B.—If the poverty of the plaintiff was a sufficient answer, it would introduce into every case a question whether the party is able to pay or not.

Rule absolute.

JONES v. ROBERTS.

Where there are issues of fact, and also issues of law, occasioned by a demurrer, but the pleadings demurred to being afterwards amended by leave, upon payment of costs, all the issues were made issues of fact:—
Held, that the Master was

THE defendant, who was sued as executor, pleaded *plene administravit* and judgments outstanding. The plaintiff replied fraud, and, the defendant having rejoined, the plaintiff demurred. The defendant had leave to amend on payment of costs. He accordingly amended, and, upon the taxation of costs, the plaintiff claimed for making up paper books with the issues of fact, and for briefs. Before the amendment, there were issues of fact and of law, but after the amendment all the issues were issues of fact.

necessary, with a little addition, occasioned by the amendment; and that addition will be costs in the cause. Where there are issues of fact and issues of law, would you be justified in making up the issue, and making briefs, without notice of trial? You would do it at your peril. You are in the same situation as if it had been right at first.

Lloyd.—There is another point. The action was for the amount of a bill of costs, which had been duly delivered. Upon a summons for better particulars, *Gurney, B.*, granted it on payment of costs. The Master disallowed 5*l.* which we charged for drawing the bill.

BAYLEY, B.—The bill had been made out before, the Master, therefore, allowed only for copying. You charged both for drawing and copying, both were not necessary.

The rest of the Court concurred.

Rule refused.

TABRAM *v.* FREEMAN.

KELLY had obtained a rule *nisi* calling upon the plaintiff to shew cause why the judgment entered up against the defendant, and the execution issued thereon, should not be set aside with costs. It appeared upon the affidavits that the defendant was indebted to the plaintiff, and, being about to take the benefit of the Insolvent Debtors' Act, employed the plaintiff, an attorney of the Insolvent Court, to procure and conduct his discharge; but it was agreed between them that the plaintiff's debt should not be inserted in the schedule; and that a *cognovit*, which had

An attorney, who held a *cognovit* for a debt, agreed with the debtor, who was about to take the benefit of the Insolvent Act, and for whom he prepared the schedule, and acted as his attorney in obtaining his discharge, that the debt should be omitted out of the schedule, and that the

cognovit should continue in force, notwithstanding his discharge. The insolvent obtained his discharge, and the attorney having issued execution on this *cognovit*, the Court set it aside.

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v.
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been given to secure it, should, be suspended until after the defendant's discharge, and then revived. About two years afterwards the plaintiff entered up judgment on the *cognovit*, and issued execution. The present rule was moved for to set aside that judgment and execution, on the ground that the agreement was a fraud upon the Insolvent Debtors' Court, upon the creditors of the insolvent, and upon the policy of the law.

Follett shewed cause.—Here there was no proof of actual fraud, which was held to be necessary in *Howard v. Bartolozzi* (a). As to the agreement being a fraud upon the Insolvent Court, no creditor being bound to come in, the Court could not be deceived by the omission of any particular debt. It is no fraud upon the creditors at large, because they have in fact each a greater present share of the insolvent's effects than if another creditor had been added to their number. Nor is it a fraud upon the law, for the reasons given in *Howard v. Bartolozzi*. He also cited *Carpenter v. White* (b), and *Jackson v Davison* (c).

Kelly, in support of the rule.—Such an agreement as this is a fraud upon the Court, the creditors, and the law. It is a direct agreement between the insolvent and his at-

gain a priority of execution, and seize the whole after-acquired effects, to the prejudice of the other creditor. So, it is a clear fraud upon the policy of the law, which contemplated the effectual and complete discharge of the person of the debtor, and the application of all his effects present and future to the fair and proportionate satisfaction of his debts. *Howard v. Bartolazzi* was decided upon too limited a view of the Insolvent Debtors' Act; the 40th section was not brought to the notice of the Court; and the attorney ought not to be allowed to take advantage of a falsity.

BAYLEY, B.—This judgment cannot be permitted to stand. The plaintiff, by agreeing that a schedule omitting his own debt shall be delivered in under the statute, agrees that the defendant shall deceive the Court by a wilfully false statement upon oath, contrary to sections 40 and 71 of the Insolvent Debtors' Act. This alone would avoid the agreement; but the creditors are also imposed upon. They have a right to believe that the debtor is set free, and that by his future exertions he may procure the means of supporting himself and satisfying their just claims. How can he do this if his person and property are liable to an execution whenever, after his discharge, the plaintiff finds it advantageous to come upon him? The true scope and object of the statute appear to have been but partially considered in the case of *Howard v. Bartolazzi*. The intent of the statutes was, that insolvents should lay before their creditors and the Court a fair and true statement of their affairs; that where they have been guilty of no misconduct, their persons should be discharged and their property divided among their creditors; and that, when discharged, they should be unincumbered with prior obligations, and free to seek their livelihood, subject to the right of the creditors to their future surplus property; all these objects might be defeated if agreements like the present could be supported in law. Neither does it appear that it was explained to the insolvent what would be the effect of leav-

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ing the debt out of the schedule, or that he knew the consequence of it. The rule for setting aside the judgment and execution must be absolute with costs; and if the plaintiff be advised to try the question in an action, and have the opinion of a court of error, he can do so.

VAUGHAN, B.—The 63rd section provides for the case of a debt being incorrectly stated without fraud, and enables the creditor to have the benefit of the provisions of the act notwithstanding such mistake; but no provision is made for the case of the total exclusion of a debt. If such an agreement as the present were allowed, the rights of the creditors under the act would be varied by it.

BOLLAND, B.—The future creditors would also be defrauded if a present creditor of the insolvent to a large amount might lie by and afterwards come in and sweep away all the goods which the new creditors had entrusted to him, on the faith of his having been cleared from all his debts.

GURNEY, B.—The 40th section requires that every person applying under that act shall deliver a schedule, con-

WINGROVE v. HODSON.

1834.

ARCHBOLD applied for a rule for judgment as in case of a nonsuit. The issue was entitled *Monday, July 22, 1833*, and was delivered on the part of the plaintiff on the *24th of October*, but without notice of trial being indorsed thereon.

Where the issue was dated in *July*, and no notice of trial was given:—
Held, that a motion in the next *Hilary* Term for judgment as in case of a nonsuit was too early.

BAYLEY, B.—There was no possibility of giving notice of trial except for the first sittings in *Michaelmas* Term.

The Court having intimated that the motion was too early (*a*), it was suggested that, since the Uniformity of Process Act, the plaintiff ought not to be entitled to so much indulgence. The matter was directed to be mentioned on the morrow. His Lordship then said, that he had in the interim consulted with Mr. Justice *Parke* and Mr. Justice *Patteson*; and that they were of opinion that the Uniformity of Process Act had made no alteration as to moving for judgment as in case of a nonsuit; and that it was quite clear that a defendant had no right to move until the third term after issue joined, unless notice of trial had been given.

Archbold.—If issue was joined in *Trinity* Term, the plaintiff would be bound to try in *Michaelmas* Term. Formerly, if the issue was made up in *Trinity* vacation, it was intitled as of *Trinity* Term: that term was always reckoned one, *Michaelmas* Term another, and in *Hilary* Term a motion might be made. The form of the affidavit was, that issue was joined as of such a term.

BAYLEY, B.—The plaintiff has the whole of the term after that in which issue was joined. There is no default

(*a*) It was made on *Tuesday, Jun. 14.*

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till the third term. There must be a default. You may come the term next after that in which issue was joined if notice of trial has been given; but not till the following term, if no notice has been given.

VAUGHAN, B.—The plaintiff is only bound to take one step in a term.

Rule refused.

HILL and Others, Executors, v. SALTER.

Upon the trial of an issue, in an action of debt on bond, before the sheriff, under the Writ of Trial Act, a variance appeared between the bond as stated in the declaration and the bond produced in evidence: the penalty in one being 260*l.*, and the penalty in the other

THE trial of the issue in this action took place before the sheriff of *Stafford*, under the provisions of the 3 & 4 *Will. 4*, c. 42. The sum sought to be recovered was 14*l.* The action was on a bond alleged to be in the penal sum of 260*l.*, but the bond produced was in the penal sum of 200*l.* The defendant insisted that the plaintiff ought to be nonsuited for the variance; but the under-sheriff refused to do so: and the jury found a verdict for the plaintiff for damages on the issue of *non est factum*.

Thesiger now moved for a nonsuit.—The bond produced was different from that stated in the record. There was

the act, if not within the words. I think an amendment ought to have been made in this case. The verdict is within either penalty.

Rule refused.

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HILL
v.
SALKER.

CALLUM v. LEESON.

WIGHTMAN shewed clause against a rule which had been obtained by *Kelly* for discharging the defendant out of custody. One objection was, that the defendant was arrested by the name of *Henry*, his real name being *Thomas Henry*; but he contended that this was no objection since the 3 & 4 Will. 4, c. 42, s. 11, which enacted that no plea in abatement should be allowed in any personal action; but that, in all cases in which a misnomer would have been pleadable, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name upon a Judge's summons. If this motion were to succeed, the act would be neutralized. The defendant might have compelled us to amend, but no application has been made.

An affidavit of debt for money lent and interest, without shewing how the interest accrued, is bad. Whether, since the 3 & 4 Will. 4, c. 42, s. 11, a defendant arrested by a wrong Christian name can apply to be discharged on motion, *quærs.*

Kelly.—Another objection was, that the affidavit to hold to bail was for one entire sum of money, 920*l.* and upwards, for money lent and advanced, and interest thereon.

BAYLEY, B.—On the statute just referred to, you cannot recover interest without an agreement (a).

Kelly.—In *Brook v. Coleman* (b), it was held that an affidavit, that a party is indebted upon and by virtue of a bill of exchange, must specify the amount, because part of the debt might be made up of interest.

Wightman.—Admitting that, holding to bail merely for interest is not objectionable.

(a) Sect. 28.

(b) 2 Dowl. P. C. 7; 1 C. & M. 621, S. C.

1834.
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 LEESOM.

BAYLEY.—What authority is there to shew that you can hold to bail for interest. I do not like the decisions, but cannot help it. Upon the first point I have some doubt; but, upon the other point, the rule must be absolute without costs.

The rest of the Court concurring—

Rule absolute.

BAKER v. MILLS.

In taxing an attorney's bill, if a full sixth is taken off, the attorney is always liable to pay the costs of taxation; if less than a sixth is taken off, it is in the discretion of the Court to make him pay the costs or not; and, therefore, where a large sum is taken off, being within a trifle of a sixth:—*Held*, that the Master was justified in charging the

THE Master, in taxing a bill of costs to the amount of 272*l.*, taxed off a sum of 42*l.* odd, which was within 3*l.* of a sixth. The Master had charged the attorney with the costs of taxation.

Steer obtained a rule *nisi* for allowing to the attorney the costs of taxation, less than a sixth having been taken off.

Archbold shewed cause.

BAYLEY, B.—If a sixth is taken off the bill, the statute (*a*) is imperative, and the attorney must pay the costs of taxation; but if less than a sixth is taken off, it is discretionary with the Court to allow the costs or not. In

Edwards v. Barnes (1), the Court refused to allow the costs

1834.

REX v. MABERLEY.

AMOS moved for a writ of immediate extent, and that it might be dated of the day the fiat of bankruptcy issued against the defendant. In one case he said it was granted after a lapse of three years, where there had been a bankruptcy a short time previous.

The Court refused to allow a writ of immediate extent to be antedated.

BAYLEY, B.—An extent ought to be dated of the day it issues. *Vigilantibus*, &c. applies to the Crown. Here there has been a lapse of a year and a half; in the case cited there was probably a former extent.

Rule refused (*b*).

(*a*) 2 M. & Scott, 197; 9 Bing. 128, S. C.

(*b*) See *Rez v. Munn*, Str. 749; *Giles v. Groner*, 9 Bing. 128.

FINCH v. COCKER.

DOWLING had obtained a rule *nisi* for setting aside a bail-bond, on the ground of a variance in the defendant's name, which was *Cocken* and not *Cocker* (*a*).

The affidavit in support of a rule to set aside a bail-bond on the ground of a mistake in the defendant's surname must be intitled with the right name of the party, and not with the name by which he was arrested.

Barstow, on shewing cause, objected to the title of the affidavit on which the rule was obtained. The affidavit was entitled "*Finch v. Cocker*;" he contended it ought to have been "*Finch v. Cocken*, sued by the name of *Cocker*." He cited *Shaw v. Robinson* (*b*) to that effect.

Dowling, *contra*, mentioned a case where *Littledale, J.*, on a like objection, allowed the motion to be renewed; but—

(*a*) See *Cullum v. Leeson*, *ante*, 381.

(*b*) 8 D. & R. 423.

1834.

FINCH
v.
COCKNER.

BAYLEY, B., said, it could not be allowed on a motion like the present; and that the objection was a good one.

Rule discharged, without costs; and four days allowed to put in bail.

ROWE v. RHODES.

The defendant cannot apply for costs under the 43 Geo. 3, c. 46, s. 3, where he has paid money into Court which is taken out by the plaintiff.

KELLY shewed cause against a rule which had been obtained by *Cresswell* for taxing the defendant his costs under the 43 Geo. 3, c. 46, s. 3, he having been arrested for a greater amount than was recovered by the plaintiff. The case had been argued at some length on the last day of last term; but, as there appeared to be conflicting authorities as to whether it was a case within the act, it stood over to the present term. The circumstances were these. The plaintiff's demand was 91*l.*, for which sum he arrested the defendant: the defendant paid 1*s.* into Court on the usual rule; and ultimately the plaintiff took it out of Court, and the costs were taxed for him up to that time. There was no dispute that there had been at one time a debt to the amount of 91*l.*; but it appeared, that, on the 6th of

April for the 91*l*. After the bill was paid, the defendant paid the shilling into Court. The plaintiff, it was said, presented the bill when it became due, to prevent any question about his making the bill his own; and, the debt having been paid after the commencement of the action, he took out the money paid into Court, with costs, as he could only have been entitled to recover nominal damages. It was contended that this was not a vexatious case, as the defendant, by paying money into Court, admitted that the plaintiff had had a good cause of action; and that, unless there was a smaller sum *recovered* by the plaintiff by verdict, the statute did not apply. It was said there were at least sixteen authorities upon the point; and that it was an absurdity and contradiction, where the defendant had paid money into Court, and thereby admitted his liability to pay costs, that he should be allowed afterwards to call on the plaintiff to pay them. He cited *Roussery v. Aleeson* (a), and *Butler v. Brown* (b), in which it appeared that there had been before five cases upon the point that the money must be recovered by verdict; and *Davey v. Renton* (c) to the same effect. In one case, the Court of *King's Bench* refused to hear counsel upon a point where there were three decided cases in support of it; and no point can be more clearly or conclusively settled, than that unless there has been a recovery of a less sum, the 48 *Geo. 3* does not apply.

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 v.
 Rows.

Cresswell, in support of the rule.—It is clear there was a want of reasonable and probable cause for the arrest; and the plaintiff's conduct has been vexatious. The authorities are conflicting. It was admitted, in moving for the rule, that *Laidlaw v. Cockburn* (d) has been over-

(a) 13 East, 90.

C. 711.

(b) 3 Moo. 327; 1 B. & B. 66.

(d) 2 New Rep. 76.

(c) 4 Dowl. & Ryl. 186; 2 B. &

1834.

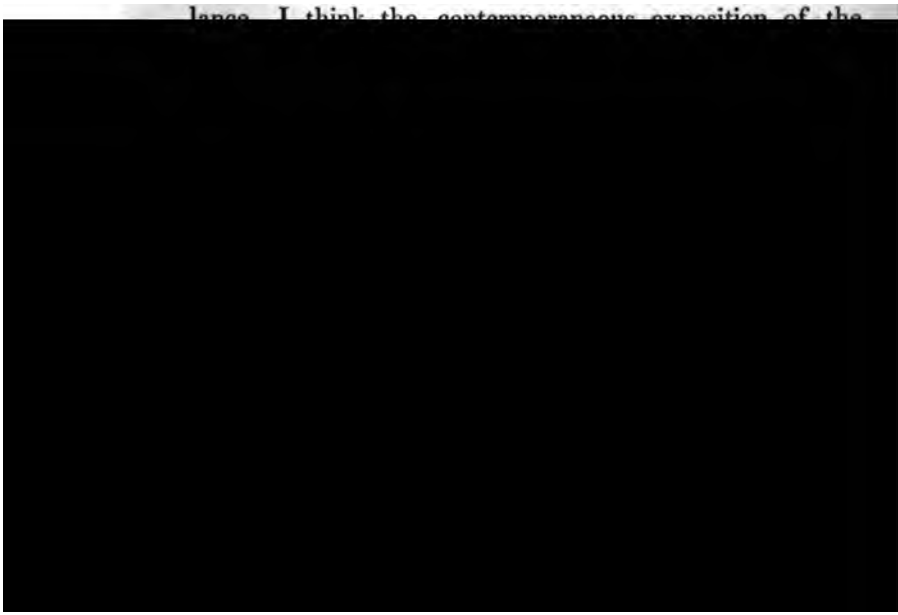
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ruled by *Butler v. Brown*, and *Davey v. Renton*; but the present case is distinguishable from those cases, because there the only proof of vexation was the taking the money out of Court. In *Plummer v. Savage (a)*, in this Court, it seemed to be considered incumbent upon the plaintiff to account satisfactorily for his having taken out of Court a less sum than that recovered. *Payne v. Acton (b)*, was a case where an arbitrator found a less sum to be due.

BAYLEY, B.—The cases of arbitration depend upon this: if by order of *Nisi Prius*, then the finding of the arbitrator is the same as a verdict; but if by collateral agreement, it would be different.

Cresswell.—In *Robinson v. Elsam (c)*, where an attorney held a defendant to bail for a larger sum than upon taxation was found to be due to him, it was held that that was a case within the 43 *Geo. 3*, c. 46. The decisions are not uniform; and, in a case of oppression like the present, the Court would be inclined to extend relief to the defendant.

BAYLEY, B.—If there were such a number of conflicting authorities on either side as to leave no fair balance, I think the contemporaneous exposition of the



stances the act was held not to apply; and those cases are strong as a contemporaneous exposition. In *Laidlaw v. Cockburn* the Court of *Common Pleas* certainly did hold that the act equally applied where money was paid into Court; but in the late case of *Butler v. Brown*, where a small sum was paid into Court, and the defendant moved, on the authority of *Laidlaw v. Cockburn*, Dallas, C. J., said, that it had been decided in five subsequent cases, that the statute did not apply to such a case; and the Court of *Common Pleas* discharged the rule: the distinction was, therefore, abandoned; and disavowed in five subsequent cases. *Robinson v. Elsam* was on an attorney's bill, and it was referred to be taxed. The Master may be considered as having an unlimited authority where a bill of costs, and costs only, is referred to him; and *Abbott*, C. J., decided on the ground of the plaintiff being an attorney. Therefore, there is the authority of the Court of *King's Bench* and *Common Pleas* upon the point; and it does not appear that the point has been discussed and brought into doubt subsequently to those cases; and therefore we must hold that the statute does not apply. But, upon the statement of Mr. *Kelly*, I doubt whether it was a fair case for an arrest.

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 v.
 RHODES.

VAUGHAN, B.—The only proper sense of “recover” is by verdict and judgment. The act uses the word “recover” throughout. Where the amount is referred to an arbitrator, a verdict is entered up. The preponderance of authority is in favour of the plaintiff; and the *Common Pleas* appear to have been anxious to retrace their steps since *Laidlaw v. Cockburn*.

Rule discharged, with costs.

1834.

An executor plaintiff is not liable to costs on a judgment as in case of a nonsuit.

PICKUP and Another, Executors, v. WHARTON.

THIS was an action by the plaintiffs as executors, and was brought to recover the amount of a promissory note of the date of 1812, all the promises being made to the testator; the defendant had pleaded the general issue and the Statute of Limitations. Notice of trial was given for the *Lancaster Summer Assizes*, and countermanded. A rule for judgment as in case of a nonsuit was discharged on a peremptory undertaking, and, in consequence of the plaintiffs again failing to proceed to trial, a rule absolute for judgment as in case of a nonsuit was obtained. The Master in taxing costs allowed the defendant the whole costs of the cause, although it was objected that they, the plaintiffs, as executors, were only liable for costs after a wilful default.

Butt obtained a rule *nisi* for the Master to review his taxation, and for taxing only such costs to the defendant as were occasioned by the wilful negligence of the plaintiffs.

Addison shewed cause.—He contended that the plaintiffs were liable to costs. The circumstances of the case shewed wilful negligence or misconduct on the part of the plain-

There is no distinction between those cases and judgment as in case of a nonsuit. If there has been any negligence, it is sufficient; but here there has been negligence and oppression, for they arrested the defendant after they knew of the defence intended to be set up; and even supposing there had been a verbal promise to pay, as is alleged, they must have known that it was necessary to have a written promise. There is no distinction between interlocutory and final costs in this respect.

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BAYLEY, B.—An executor or administrator suing on a cause of action arising in the testator's lifetime, is not liable to costs on a verdict or nonsuit. I find it so laid down in an unexceptionable book of practice, and it has been so settled as long as I have been in Court. An executor is liable on a nonpros. In that case he is ruled to declare or reply. If he makes default, and his default is recorded in Court, it is considered that he and his pledges to prosecute be in mercy. In that case he is liable to costs, on the principle that he fails by his own wilful neglect to go on. Upon a discontinuance, he is or is not liable to costs, according to circumstances; he applies to discontinue, as a favour; the Court look into the circumstances, and give costs or not, as they think proper; they are interlocutory up to that time. The case of *Booth v. Holt* (a) decided that an executor is not liable to costs on judgment as in case of a nonsuit; and it would be error if they were to be awarded against him. On judgment as in case of a nonsuit, the cause is at an end, and the costs must have been taxed on record; they are not interlocutory costs. A judgment as in case of a nonsuit is the same as a nonsuit; in the latter, no costs are allowed, and, therefore, none on the former. For forty years there has been no instance of costs given in such a case. Every case, as it occurred,

(a) 2 H. Bl. 277.

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would be brought before the Court, on the ground that the executor had been indiscreet. If you apply for judgment as in case of a nonsuit, you must take it with all the consequences; one is, that you get no costs.

VAUGHAN, B.—The rule is so laid down in *Williams on Executors*.

BOLLAND, B.—In *Eaves v. Mocato* (a), the Court laid it down, that, in *assumpsit* by an executor for a cause of action accruing in the lifetime of the testator, the executor is not liable to pay costs on a nonsuit. In *Comber v. Hardcastle* (b), the Court were of opinion that the plaintiff had acted with bad faith, and Lord *Alvanley* considered that he was guilty of a contempt in abusing the process of the Court. That case was commented upon in *Woolley v. Sloper* (c), and the Court there held, that, on a judgment as in case of a nonsuit, an executor who has been guilty of wilful negligence is only liable to the costs occasioned by his own neglect.

GURNEY, B.—In *Comber v. Hardcastle*, the executor lent his name to another party.

Rule absolute (d).

BRAINE, Assignee, v. HUNT and Another.

1834.

THIS was a motion made by *Cooper*, under the Interpleader Act, on behalf of the sheriff of *Oxford*. The writ was delivered to the sheriff on the 12th of *December*. The goods were seized on the 26th. On the 28th, a notice was sent of a claim under a bill of sale. On the 1st of *January*, the sheriff was ruled to return the writ. On shewing cause, it appeared that all the property seized, except a fly, had been since delivered up by the sheriff to the claimant.

If the sheriff, having seized goods in execution, which are claimed by another party, delivers up part of the goods to the claimant, he thereby precludes himself from taking advantage of the Interpleader Act.

W. H. Watson appeared for the execution creditor.

Miller, for the claimant.

Affidavits on shewing cause are in time if sworn at any time before cause is shewn.

Cooper, in support of the rule, contended, that, as he had moved on an express affidavit that the goods were then in the possession of the sheriff, the Court would not discharge this rule on an affidavit of the officer that part of the goods had been since delivered up. That affidavit was sworn after the day mentioned in the rule for shewing cause.

BAYLEY, B.—If the affidavit is sworn at any time before shewing cause it is in time.

Cooper.—Perhaps they were given up because the fly would be sufficient to satisfy the execution. The only effect would be, that the rule must be discharged as to those goods which have been delivered up. It is not sworn that the goods were given up collusively, and it is sworn that we have no indemnity. If the fly should not be sufficient, the sheriff would be amenable to the execution creditor.

BAYLEY, B.—The sheriff says, he has the goods in his

1834.

BRAINE
v.
HUNT.

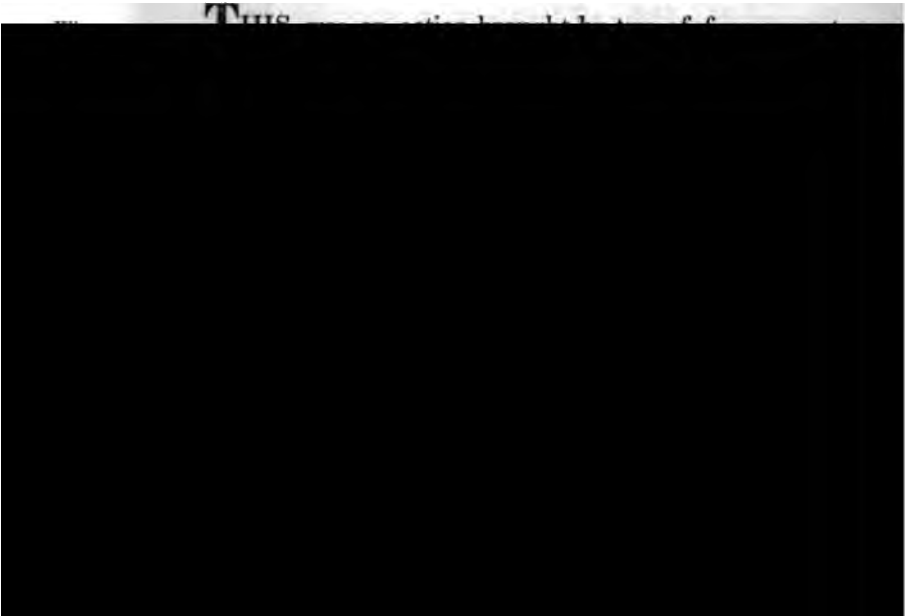
possession, and now it appears that part have been given up. I think he does not act fairly if he gives up part of the goods; in fact, he colludes with the party to whom he delivers them up. The object of the act was, by means of a suit and one suit only, and that between the parties really interested, the question of right should be tried, and the sheriff exonerated. Here the claimant might try his right in an action against the execution creditor, but he would have a right to sue the sheriff for the goods delivered up, and for returning *nulla bona* as to part. I therefore think that the sheriff is not entitled to the protection of the act, and that the rule should be discharged.

VAUGHAN, B.—The sheriff ought to have a control over the goods the whole time. The costs will fall on the officer.

Rule discharged with costs, and ten days
allowed to return writ.



HERBERT and Another, Executors, v. PIGGOTT, Bart.



other executors having afterwards released the action, the defendant pleaded that release *puis darrein continuance*. *Butt* having obtained a rule *nisi* to set aside that plea—

1834.
HERBERT
v.
PIGGOTT.

R. V. Richards shewed cause, upon affidavit, that the release was the spontaneous act of the releasors, and that there was a larger sum due from the testator to the defendant, for money received on his account, for which an action had been brought. He contended, that, unless a very clear case of fraud was made out, the Court would not interfere. By one account delivered by the testator only six weeks before his death, there appeared a balance in favour of the defendant. The defendant's object was to prevent injustice, and, if there is fraud, the plaintiffs can reply that fact.

Busby, in support of the rule.—There are two questions; *first*, whether the defendant has a right to put such a plea upon record, the release being made by strangers to the record.

BAYLEY, B.—They are not strangers to the action. That objection is on record; and if we were to decide wrong, it would take away the right of the other side to bring error; and therefore, upon that point, I think we ought not to interfere.

Busby.—The second point is, whether there is not such a case of fraud as will induce the Court to interfere. By "fraud," the Court does not mean criminal fraud, but only such fraud as works injustice.

BAYLEY, B.—A release may advance the interests of justice.

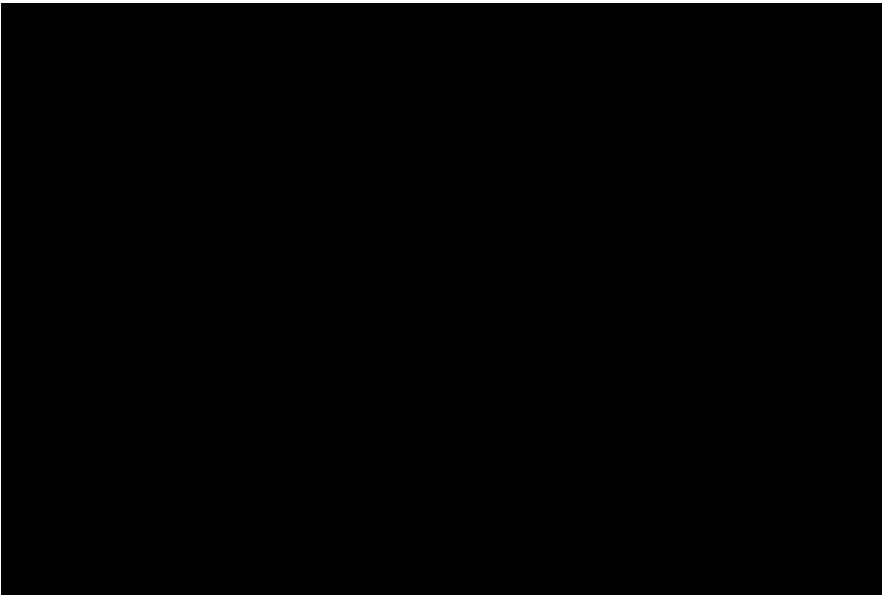
Busby.—The evidence of fraud is, *first*, that no consi-

1834.

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deration for the release passed from the defendant to the releasors; secondly, the plaintiffs alone are the persons beneficially interested in the action; and, thirdly, the releasors are in the service of the defendant, one as butler, the other as cook. It is sworn that the 90*l.* is justly due to the plaintiffs. The defendant pleads that the two other executors, in consideration of 22*l.* 7*s.* paid to the plaintiffs, released. The effect of that will be to prevent the plaintiffs trying the question whether there is a debt or not; and our only remedy will be against the executors who have released, and whom we swear it will be difficult to bring to account. He cited *Mountstephen v. Brook* (a), *Innell v. Newman* (b), and *Jones v. Herbert* (c), as instances where the Court had interfered summarily.

BAYLEY, B.—Two of the executors make a claim on the defendant for a sum of nearly 100*l.* The defendant pleads a release by the two other executors, given by them at their own suggestion, and without the interference of the defendant. They are co-executors with the plaintiffs, and properly they ought to have been co-plaintiffs. If there had been a strong case of fraud made out, the case in the *Common Pleas*, of *Jones v. Herbert*, would have



1834.

BEST v. GOMPERTZ.

THE defendant having been brought up to be charged in execution—

Platt and *Humfrey*, for the defendant, opposed the motion, on the ground that a writ of error had been sued out and allowed; and they cited *Stonehouse v. Ramsden* (a), in which it was held, that the allowance of a writ of error was sufficient to prevent the plaintiff from charging the defendant in execution. The same point they said had been determined in the Bail Court by *Parke, J.*, in *Davis v. Gompertz* (b), last term, where there was a release of errors.

R. V. Richards and *J. Jervis, contrà*.—That is not the practice in this Court. The allowance of a writ of error is no objection, unless notice has been given. The judgment was signed on a *cognovit*; by one of the terms of which the defendant undertook not to bring a writ of error, &c. to delay or defeat the plaintiff in the action.

Humfrey, contrà.—That must be pleaded.

BAYLEY, B.—Here is a special bargain not to sue out a writ of error; if it appears that the writ of error is sued out for delay, and contrary to good faith, the writ of error might go on, and yet the defendant might not avail himself of it here. *Primâ facie*, they are entitled to charge in execution, and the defendant expressly agrees not to sue out any writ of error. A release of errors must be pleaded; but here there is an express agreement. The defendant prays by his writ of error to be restored to every thing he has lost. It has been frequently decided,

Where a defendant gives a *cognovit*, and expressly agrees not to bring a writ of error, but notwithstanding does so, the allowance of such writ of error is no *supersedeas*, and will not prevent the plaintiff from charging him in execution.

Semble, that there is a distinction between a release of errors and an agreement not to bring a writ of error.

(a) 1 B. & Ald. 676.

(b) *Post*, p. 407.

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 ———
 BEST
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that error is no *supersedeas* where it is for delay, or against good faith.

The defendant was accordingly charged in execution.

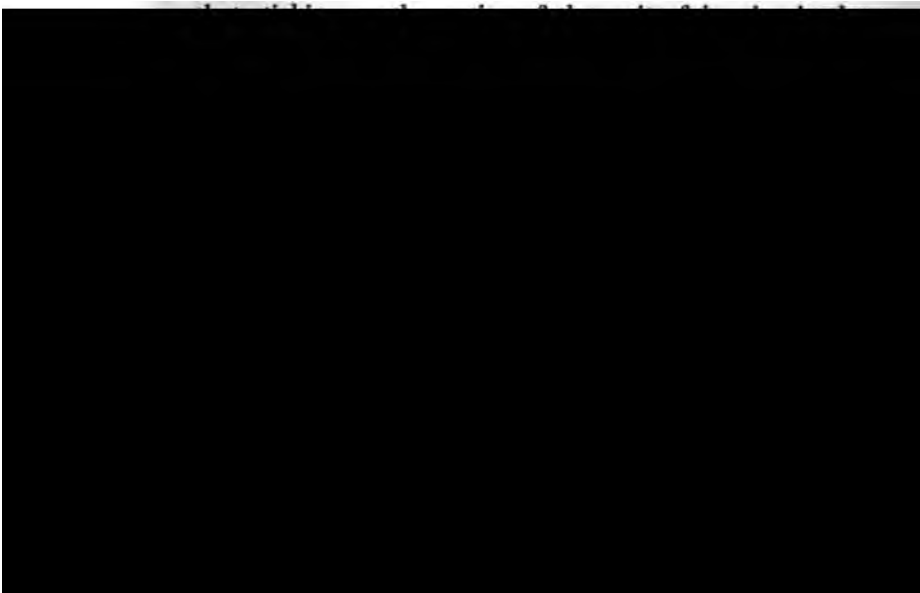


WATSON v. DELCROIX.

Notice of a writ of inquiry was allowed to be served by sticking it up in the office, and leaving it at the defendant's last place of abode, though neither the process nor notice of declaration had been personally served.

BUTT applied for leave to serve a notice of inquiry, by sticking it up in the office, and leaving a copy at 21, *Maddox Street*, the defendant's last place of residence. The defendant had not appeared to the writ of summons; but a *distringas* had been obtained, and a Judge's order for entering an appearance. The declaration was filed on the 13th of *December*, and leave was given to serve notice of it, by sticking it up in the office, and leaving a copy at 21, *Maddox Street*; the people at the house having refused to tell where the defendant was gone. Judgment by default had since been signed for want of a plea.

BAYLEY, B., doubted at first whether the Court had power to grant the motion; but afterwards granted a rule,



KING'S BENCH PRACTICE COURT.

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILL. IV.

REGULA GENERALIS (a).

1834.

REG. GEN.

IT IS ORDERED, that, from and after the 10th day of *July* next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at *Westminster*, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that, upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon the payment of the costs of the writ and service thereof only.

T. DENMAN,	J. PARKE,
N. C. TINDAL,	W. BOLLAND,
LYNDHURST,	J. B. BOSANQUET,
J. BAYLEY,	W. E. TAUNTON,
J. A. PARK,	E. H. ALDERSON,
J. LITTLEDALE,	J. PATTESON,
S. GASELEE,	J. GURNEY.
J. VAUGHAN,	

(a) This rule was promulgated in last *Trinity* Vacation.

1833.

SMITH *v.* GOOD.

Service of a writ of summons to procure a *distringas*. All the three calls need not be made by the same person.

ON an application for a *distringas*, under the 2 & 3 Will. 4, c. 39, s. 3, it appeared that the writ of summons was issued on the 10th *October*. On the 15th, the plaintiff's attorney called, and saw the defendant's shopman, whom he fully acquainted with the object of his call, and was informed that his master was from home. The attorney appointed next day at eleven o'clock for a second call, and went accordingly at that time; he again saw the shopman, who stated that his employer was out of town. He then left a copy of the writ with the shopman. The third call was made by the attorney's clerk, but not in pursuance of any specific appointment, and he forgot to leave a copy of the writ. He, therefore, called a fourth time, and then left a copy of the writ with a female servant at defendant's house. There were two affidavits, one by the attorney, and the other by his clerk, as to the above facts.

LITTLEDALE, J.—The service is bad for two reasons; *first*, no time is specified for the third call; and, *secondly*, no copy of the writ is left at the third call, but is left at the second visit instead. It is true a copy is left at the

1833.

DOE *d.* NORMAN *v.* ROE.

C. CLARKE applied to be allowed to sign judgment against the casual ejector on the following service:—His affidavit stated that the premises in question had been under-let to a person named *Adams*, who had again let them to another person since dead. The house, with the exception of two outer walls, had been entirely pulled down, and the materials removed. The service had been effected by affixing a copy of the declaration and notice at the foot on the most conspicuous part of the walls left standing. Every effort had been made to discover *Adams*, in order to serve him, but without effect.

Where premises are totally deserted, and there is no one on whom service can be effected, judgment cannot be had against the casual ejector, but the proceeding must be as upon a vacant possession.

LITTLEDALE, J., thought that this amounted to a vacant possession, and, therefore, that the lessor of the plaintiff should have proceeded according to the statute.

C. Clarke said, that, in a similar case in this Court, the landlord had been allowed to proceed in ejectment, and the rule now prayed for had been granted. He cited *Doe d. Osbaldiston v. Roe* (a), where the wife and children of a tenant in possession went to *America*, and the tenant had quitted the premises, intending never to return. The declaration had been affixed to the premises, and read over and explained to a person there, who was servant to one of the tenants of another part of the premises. In that case Mr. Justice *Patteson* said,—“You may take a rule to shew cause, and serve it in the same manner as the declaration was served.” That case was as strong as the present; and as to the reading over of the notice to the servant of a third party, that was quite immaterial, for that person was not interested in the tenancy.

(a) *Ante*, Vol. 1, p. 456.

1833.

DOE
d.
NORMAN
v.
ROE.

LITTLEDALE, J.—I cannot grant this application. If I were to do so, we should never hear again of a proceeding under the statute.

Rule refused.

JOHNSON v. DISNEY.

To obtain a *distringas*, it is not sufficient that three calls are made, if the day and hour for the two subsequent calls are not mentioned, unless it is evident that the defendant endeavours to keep out of the way.

PLATT moved for a *distringas*. The writ of summons had been sued out on the 15th of *August*. The person who went to serve it had used all means to do so, but had not succeeded. The first time he called at the defendant's house, the servant said her mistress (the defendant) had gone out; he then explained the object of his visit to the servant. On the 16th of *October* he went again, and saw a young lady, who said the defendant was from home. On the 28th of *October* he called a third time, and saw the servant, who said first that her mistress was out of town, but, on deponent's saying that legal proceedings would be taken, went up stairs, and, on coming down again, said her mistress would call on plaintiff and pay the bill.

LITTLEDALE, J.—The general rule is, that three calls must be made; but calling three times is insufficient, un-

1833.

HAWKINS v. PRING.

DUNDAS moved for a rule to shew cause why an order for the discharge of a person named *Pring* under the Lords' Act (32 Geo. 2, c. 28) should not be set aside, on the ground that it had been obtained by fraud. The action was brought against the defendant for a breach of promise of marriage made by him to the plaintiff. A verdict was obtained by the plaintiff for a sum, which, with the costs, amounted to 118*l*. On the 29th November, 1827, an order was made by this Court for the discharge of the defendant under the Lords' Act. No notice of the proceedings to obtain this order was ever given to the plaintiff, and it was consequently obtained without any knowledge of it on her part. Having been obtained by fraud, the Court would of course interfere to set it aside.

Where a defendant has been discharged under the Lords' Act for five years, it is too late at the end of that period to apply to set aside the order for the discharge.

LITLEDALE, J.—It appears to me, that the present application is too late. Six years have now elapsed since the order was obtained, and the persons who might have contradicted the plaintiff's statement may be dead. After such a lapse of time, it would be too much to interfere.

Rule refused.

TAYLOR v. DUNCOMBE.

BUTT moved for leave to issue a writ of *distringas* in this case, in order to avoid the Statute of Limitations. The motion was founded on an affidavit, stating that the action was brought, in 1823, against the defendant, who was then a member of Parliament. The proceedings were commenced by bill, and writ of summons thereon.

Where a person having privilege of Parliament has been sued by bill and summons before the Uniformity of Process Act passed, and after the commencement of the action he

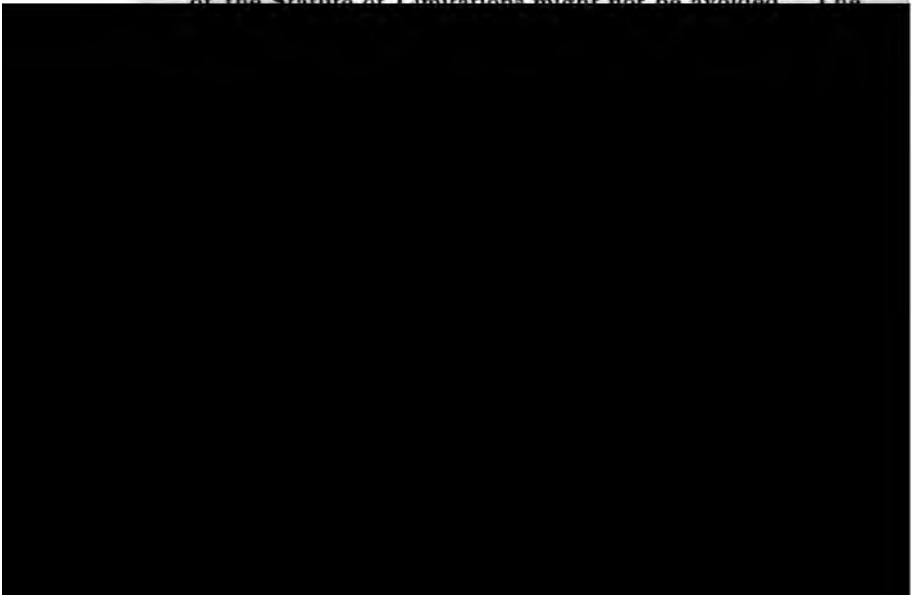
loses his privilege, the process should be continued by *distringas*, treating him as an M. P., in order to avoid the Statute of Limitations.

1833.

TAYLOR
v.
DUNCOMBE.

The writ was returned *non est inventus*, and entered of record. No further steps had since been taken, as the defendant had been out of the country. The plaintiff was now desirous of continuing the proceedings, in order to save the Statute of Limitations. The defendant, since the commencement of the action, had ceased to be a member of Parliament. The plaintiff's attorney had applied to the signer of the writs for a writ of *distringas*, but the officer felt some difficulty in issuing it, on the ground that such process would treat the defendant as a member of Parliament, he having ceased to be so. The writ of *distringas* ought to issue, as that would be the proper continuance of the suit; and the defendant being privileged when the action was commenced, it would be proper to treat him as a privileged person throughout the proceedings. The recent act of 2 Will. 4, c. 39, does not affect the question.

LITTLEDALE, J.—I think the writ of *distringas* is the proper continuance of the suit. The recent act does not apply to the case; and as the defendant was privileged when he was sued, the subsequent writs should be consistent with the original process: otherwise, the operation of the Statute of Limitations might not be avoided. The



issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ, and return

to be made, in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff or his attorney suing out the same, as the case may be."

1833.
TAYLOR
v.
DUNCOMBE.

MONTFORT v. BOND.

R. V. RICHARDS shewed cause against a rule obtained by **R. Alexander** for the purpose of enlarging a peremptory undertaking. The plaintiff in this, which was a country cause, not having proceeded according to the course and practice of the Court, the defendant obtained a rule for judgment as in case of a nonsuit. That rule was discharged on a peremptory undertaking to try at the following assizes. The plaintiff did not, however, proceed to trial; and the defendant then moved for and obtained the common rule for judgment as in case of a nonsuit absolute. The present rule had been moved for to enlarge the plaintiff's undertaking, on the ground of the absence of a material witness at the time when he should have tried according to his undertaking. The name of the witness was not, however, stated in the affidavit. If the plaintiff really did expect the attendance of that witness, he might have stated his name.

In support of a rule to enlarge a peremptory undertaking, where the plaintiff has made only one default, in consequence of the absence of a material witness, the affidavit need not state the name of that witness.

R. Alexander, in support of the rule, contended, that, as the default of the plaintiff now complained of was the first, it was unnecessary to state the name of the witness. He cited *Jordan v. Martin and Wife (a)*, in which it was decided that, in shewing cause against a rule for judgment

(a) 8 Taunt. 104.

1833.
 MONTFORT
 v.
 BOND.

as in case of a nonsuit, an affidavit that the plaintiff did not proceed to trial according to notice, in consequence of the absence of a material witness, need not name the witness. Mr. Justice *Burrough* there observed, that "it might be often very dangerous and inconvenient to name the witness."

LITTLEDALE, J.—It is not necessary that the witness should be named in the case of the first default; but in that of the second it may be different.

Rule absolute.

DOE *d.* STANLEY *v.* TOWGOOD.

Where an action of ejectment is brought on certain breaches, and money is paid into Court on one of them, and the plaintiff takes it out, and does not proceed to trial, the defendant is

AUSTIN had obtained a rule for judgment as in case of a nonsuit, in an action of ejectment on certain breaches. The first was non-payment of rent; the second, assigning without licence; the third, non-repair. The defendant paid the rent in arrear with costs, upon the first breach, into Court. The lessor of the plaintiff took this out of Court.

Kelly, on shewing cause, said, that, on payment of the

breaches assigned in an action of covenant, and money paid into Court on one of them. The plaintiff might still proceed on the others.

1833.
DOE
d.
STANLEY
v.
TOWGOOD.

Austin, contra.—The present case is like an action of *assumpsit*, with several causes of action stated in the declaration. If money be paid into Court on one of those causes of action, and the plaintiff takes it out of Court, he is at liberty to proceed on the other causes of action. If he does not so proceed, the defendant is clearly entitled to judgment as in case of a nonsuit. So, in the present case, the plaintiff is entitled to proceed with his ejectment for the other breaches; and, as he has not proceeded, the defendant is entitled, for his own security, to judgment as in case of a nonsuit.

PATTESON, J.—I think that you would not have been entitled to judgment as in case of a nonsuit, if the plaintiff had given notice that he had abandoned all proceedings against you. If you had had no such notice, then there would be the two other breaches on which the plaintiff might proceed against you. The better way will be, that a *stet processus* should be entered, with a reference to the Master, to say whether the plaintiff ought to pay any costs to the defendant in consequence of his not proceeding to trial upon the two remaining breaches.

Rule accordingly.

SOLOMONSON and Another v. PARKER and Another.

IN this case the declaration was delivered indorsed to plead within *eight* days, the defendant only being entitled to *four* days' time for pleading. The declaration was not delivered until the 6th *August*, and consequently the *eight* days would not expire until after the 10th of that month. By 12 *Reg. Gen. M. 3 Will. 4*, it is ordered, "that in case the time for pleading to any declaration, or

If a plaintiff gives a greater number of days for pleading than by the practice of the Court is required, the defendant is entitled to avail himself of that greater number.

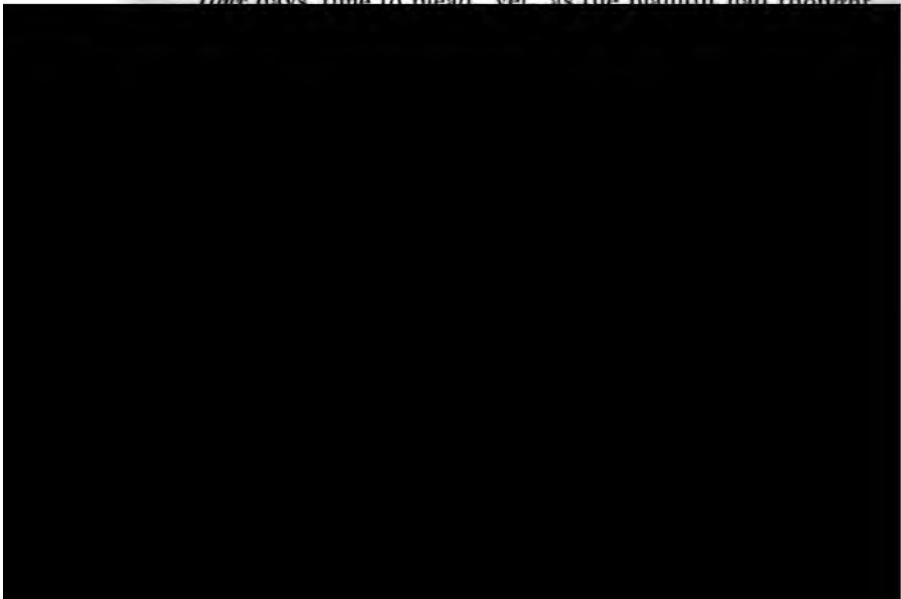
1833.
SOLOMONSON
v.
PARKER.

for answering any pleadings, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th day of *October*, as if the declaration or preceding pleading had been delivered or filed on the 24th day of *October*; but in such cases it shall not be necessary to have a second rule to plead, reply, &c." The plaintiff, however, signed judgment for want of a plea on the 30th of *October*.

Miller obtained a rule to shew cause why the interlocutory judgment so signed should not be set aside, on the ground of its having been signed too soon.

Hutchinson shewed cause against this rule, and contended, that, as by the practice of the Court the defendant was only entitled to *four* days' time to plead, those four days had clearly elapsed after the 24th *October*, and before signing judgment, and, therefore, the plaintiff was regular in signing judgment on the 30th.

Miller, contra, contended, that, although by the practice of the Court the defendant was not entitled to more than *four* days' time to plead, yet, as the plaintiff had thought



DAVIS *v.* GOMPERTZ.

1833.

(Before the four Judges.)

BALL moved on an affidavit to charge the defendant in execution for the further sum of 142*l.* 6*s.* The defendant was brought up under a writ of *habeas corpus* on the 2nd of *November*. He produced at that time a rule for the allowance of a writ of error, which had been granted that day: he was then remanded. On the 6th of *November* defendant gave notice of bail. On the 7th of *November* there was a rule for better bail. On the 8th of *November* notice of justification was given for the 11th. On the 9th, that notice was countermanded. No bail, therefore, having been put in, the allowance did not operate as a *supersedeas*.

Where a defendant gives a warrant of attorney to secure the payment of a sum of money by instalments, and default is made, he may be charged in execution for each of those defaults as they are made.

R. V. Richards objected, on an affidavit produced by him, that the defendant had been already charged in execution in this action.

Ball.—That is true, but the judgment is on a warrant of attorney in a penal sum, accompanied by a defeazance; the amount secured is to be paid by instalments, and execution to issue from time to time on non-payment of each instalment. Although the judgment was for 400*l.*, the defendant has been only charged in execution for 45*l.*, and, upon the instalment of 142*l.* 6*s.* not having been paid, the plaintiff is entitled now to charge the defendant in execution for that sum.

R. V. Richards.—The application should have been by a rule to shew cause why the defendant should not be charged in execution for the further sum.

The Court were of opinion, that the plaintiff was entitled now to charge the defendant in execution for the further sum, and directed a special entry to be made in

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DAVIS
v.

GOMPERTZ.

the Marshal's book, so that the defendant might be discharged on payment of the two several instalments.

The Master drew up the form of the entry accordingly.

DOE *d.* STANSFIELD *v.* SHIPLEY.

A judgment in an action of ejectment in an inferior jurisdiction is not within the meaning of the 19 *Geo. 3*, c. 70, s. 11; and, therefore, if the defendant leaves the jurisdiction, the judgment cannot be removed into a superior Court.

MILLER applied, under the 19 *Geo. 3*, c. 70, s. 4, to remove a judgment, in an action of ejectment, out of the county court of *Nottingham*, on the ground that the defendant had removed himself out of the jurisdiction, and had no effects within it.

LITLEDALE, J.—I feel some doubt, whether a judgment in ejectment comes within the meaning of the statute under which you apply. I will, however, look into the act of Parliament, and tell you my opinion.

Cur. adv. vult.

LITLEDALE, J.—This was an application by Mr. *Miller* to remove a judgment out of the county court of *Nottingham* in an action of ejectment pursuant to the 19

inquiry having been made after the person or persons of the defendant or defendants, or his, her, or their effects, and of execution having been issued against the person or persons or effects, as the case may be, of the defendant or defendants; and that the person or persons or effects of the defendant or defendants are not to be found within the jurisdiction of such inferior court, which affidavit may be made before a judge or commissioner authorized to take affidavits; and such superior Court to cause the record of the said judgment to be removed into such superior Court, to issue writs of execution thereupon to the sheriff of any county, city, liberty, or place, against the *person or persons or effects* of the defendant or defendants, in the same manner as upon judgments obtained in the said Courts at *Westminster*." It will be observed, that the words of the enacting part are more general than those of the preamble, because they refer to "any action or suit." Now, there are some cases in which the preamble may control the enacting part of a statute; but as this act is for the relief of persons who have been deprived of an effectual remedy, in consequence of the defendant removing out of the jurisdiction, I think that the preamble ought not to control the enacting part. So far, I should say then that there would be no difficulty in removing the judgment under the general words of the act. But the only remedy which the superior Court could give would be, by the language of the enacting part, "against the person or effects" of the defendant; and which does not enable the superior Courts to grant a *habere facias possessionem*. Such a writ would be the proper remedy, if the judgment were removed; but that cannot be considered as a remedy against the "person or effects" of a defendant; and, therefore, as such a remedy is not expressly provided, it appears to me that the Court cannot direct the judgment to be removed.

Rule refused.

1833.
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 DOR
 d.
 STANSFIELD
 v.
 SHIPLEY.

1833.

SMITH v. JOY.

Where a defendant has given a *cognovit* for the debt sought to be recovered in an action by the plaintiff, and the plaintiff does not proceed to trial, and the defendant obtains a rule for judgment as in case of a nonsuit, that rule will be discharged with costs.

THESIGER shewed cause against a rule for judgment as in case of a nonsuit. It appeared by the affidavit on which he opposed the rule, that the defendant, with the knowledge of his attorney, had, a considerable time before the rule was obtained, given a *cognovit* for the amount of the debt. He contended, that, on these facts, the rule ought to be discharged, with costs to be paid by the attorney.

LITLEDALE, J.—The rule must be discharged, and with costs to be paid by the defendant, not the attorney, as it appears he was not a party to the settlement of the claim by the *cognovit*.

Rule discharged, with costs.

JONES v. PRICE.

The provision of the Uniformity of Process Act, as to the indorsement on a writ of de-

PLATT shewed cause against a rule obtained by *Archbold* for setting aside a writ of detainer, on the ground of irregularity. The irregularity complained of was, that the sum for which the defendant was detained had not been

form of the writ of detainer contained in the said schedule, and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said Marshal or Warden, to whom the same shall be directed." At the end of the writ contained in the schedule, a direction is introduced that "this writ is to be indorsed in the same manner as the writ of *capias*, but not to contain the warning on that writ." The writ of *capias* was indorsed with the amount of the debt, of which the plaintiff had made oath. By rule 10, *M. T. 3 Will. 4*, it was ordered, "That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any judge." Nothing, therefore, could be more positive than the statute, and the rule promulgated in furtherance of it.

1833.

JONES
v.
PRICE.

LITLEDALE, J.—The act itself is positive, and the rule of Court confirmatory of it is equally positive. The writ, therefore, not having the sum indorsed, is irregular, and must be set aside. The present rule, therefore, will be absolute, with costs.

Rule absolute, with costs.

—◆—
VOKINS v. SNELL.

MILLER moved for judgment as in case of a nonsuit, absolute in the first instance. The plaintiff had given notice of trial, but did not proceed according to it. A rule

Where a plaintiff has given a peremptory undertaking (but not by rule), the rule for judgment as in

case of a nonsuit for not fulfilling that undertaking is *nisi* in the first instance.

1833.

VOKINS
v.
SNELL.

for judgment as in case of a nonsuit having been obtained, it was subsequently discharged, the plaintiff giving a peremptory undertaking to proceed to trial at the next assizes, but without a rule for that purpose.

LITTLEDALE, J.—I think the rule for judgment as in case of a nonsuit cannot be absolute in the first instance in this case, as the peremptory undertaking was not given under the authority of a rule of Court. If it had been by rule, it would be different.

Rule *nisi* granted.

FRY v. ROGERS.

In order to render good the service of a declaration, by sticking it up in the *King's Bench Office*, more than one attempt must be made to find the defendant.

PLATT moved for a rule to shew cause why service of a declaration, by sticking it up in the *King's Bench Office*, should not be deemed good service. The action was for goods sold and delivered. The defendant had lived at 21, *Bream's Buildings, Lambeth*, when the debt was contracted, and when the process was served. Every possible inquiry had been made of the neighbours, butchers, bakers, and other tradesmen, but they knew of no such person as the defendant, and the house was uninhabited.

1833.

WILLS v. BOWMAN.

JUSTICE moved for a *distringas*.—Three calls had been made. The person who went to serve the writ of summons saw the defendant's wife the first day, to whom he explained the object of his visit. On the second and third calls he saw defendant's servant.

In order to obtain a *distringas*, the person endeavouring to serve the summons must appoint the day and hour at which he will make his subsequent calls.

LITLEDALE, J.—That will not do. He ought to have mentioned the day and hour on which he would call again, and then, perhaps, he might have seen the defendant.

Rule refused.

DOE v. ROE.

PLATT moved for judgment against the casual ejector. The affidavit stated, that the premises were deserted and locked up, and that the deponent *verily believed* that there was no sufficient distress on the premises. On inquiring of the neighbours, it appeared that the lessees had left some time ago, and had removed all the furniture, &c. previous to their departure.

The affidavit of there being no sufficient distress on the premises must be *positive*; the deponent's *belief* will not do.

LITLEDALE, J.—The affidavit must be positive that there is no sufficient distress on the premises.

Platt.—We cannot make such an affidavit, unless we break open the house, in order to be satisfied of that fact.

LITLEDALE, J.—I cannot help that. The practice is, that the affidavit must be positive, and I do not feel warranted in departing from it in this instance.

Rule refused.

1833.

DOE v. ROE.

Service on the daughter on the premises will not suffice, unless it is shewn that the declaration came to the hands of the father, with proper explanation.

DESAUMAREZ moved for judgment against the casual ejector. The affidavit stated that the copy of the declaration had been served on the daughter of the tenant in possession on the premises, and that it had been read over and explained to her. The affidavit did not state that she had delivered or explained it to her father, nor anything to shew that he had been apprized of it.

LITLEDALE, J.—That will not do. If such motions as these are acceded to, there will be an end of all rule on the subject.

Desaumarez then asked for a rule to shew cause, but the Court refused.

Rule refused (a).

(a) See *Doe d. Cockburn v. Roe, ante*, Vol. 1, p. 692. As to service on the mother of the tenant, see *Doe d. Smith v. Roe*, 1b. 614.

HUNT v. PASSMORE.

through the carelessness of the other party. I think it will be better, first, to make an application to the defendant for the 50*l*. (The Court was informed that such an application had already been made, but without success). Then the plaintiff may take a rule to shew cause why the defendant should not pay over the money, and, in default thereof, why a new writ of *fieri facias* should not be issued.

Rule to shew cause accordingly.

1833.
HUNT
v.
PASSMORE.

NEWBERRY v. COLVIN.

THE *Solicitor-General* applied for a rule to shew cause why the Master's taxation should not be reviewed, on the ground of the defendant not having been allowed a sufficient amount of costs. The cause had originally been tried before Lord *Tenterden*, and he nonsuited the plaintiff. An application was afterwards made to the Court of *King's Bench* to set aside the nonsuit or obtain a new trial. The Court thought it was a fit case to be put upon the record, and a special case was made of it. A new trial was ultimately granted, and the defendant took down the record by proviso. Judgment was afterwards given by the Court of *King's Bench* in favour of the plaintiff. The defendant brought a writ of error in the *Exchequer Chamber*, and that Court reversed the judgment of the Court of *King's Bench*. The plaintiff appealed to the *House of Lords*, and there the judgment of the Court of *Exchequer Chamber* was confirmed. The defendant, therefore, ultimately succeeded. Nothing was said in the rule for the new trial about the costs of the first trial; but, as the defendant has ultimately succeeded, he contends that he is entitled to the costs of the first trial.

Where a new trial is granted, and nothing said in the rule of the costs of the former one, and after various subsequent proceedings one party succeeds, he is not entitled to the costs of the first trial.

CASES IN THE PRACTICE COURT, K. B.

LITTLEDALE, J.—When a new trial is granted, and nothing is said about the costs of the first trial, they fall to the ground, as a matter of course. The Court can now do nothing with respect to them. By 1 *Reg. Gen. H. T. 2 Will. 4, s. 64 (a)*, it is ordered, that “if a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.” This rule, therefore, cannot be granted.

Rule refused.

(a) *Ante*, Vol. 1, p. 191.

WILSON and Another v. BRADLOCKE.

If the time for pleading does not expire until after the 10th of August, although it may be enlarged time, the defendant has still the same time for pleading as if the declaration had been

KNOWLES applied for a rule to set aside a judgment signed under the following circumstances:—The plaintiff had declared and delivered particulars of his demand. On the 25th of July a Judge's order had been obtained for further particulars, and on the 29th of July the defendant had obtained another Judge's order for a week's time to plead after delivery of the further particulars. The plaintiff did not deliver the further particulars until the 5th of August, so that the time for pleading did not expire until the 10th of August. By *Reg. Gen. M. T. 3 Will. 4*, in furtherance of the order, it is ordered, that “in

tended was irregular, as even, if the further time to plead were considered as an indulgence, the plaintiff had had time to deliver his further particulars, so as to get a plea before the 10th *August*.

1833.
 WILSON
 v.
 BRADLOCKE.

Mansel shewed cause in the first instance, and contended that the rule only applied to cases where the original time to plead expired after the 10th *August*, and not where, as in this case, indulgence had been granted.

LITLEDALE, J., (after consulting the Master).—The rule must apply to all cases where the time to plead expires after the 10th *August* and before the 24th *October*. I am informed by the Master that no proceedings would be taken in the office during that interval.

Rule to set aside judgment, but without costs.

STORR and Another v. MOUNT, a Prisoner.

THE defendant, being a prisoner in the *King's Bench* prison for debt, at the suit of several persons, the present plaintiffs lodged with the Marshal a writ of detainer for 56*l*. The writ was directed, "To the Marshal of our prison of the *Marshalsea*."

A writ of detainer directed "to the Marshal of our prison of the *Marshalsea*," instead of "the Marshal of the *Marshalsea* of our Court before us:"—Held irregular, and the defendant was discharged out of custody.

Platt obtained a rule *nisi* for setting aside the writ with costs, and for discharging the defendant, on the ground that the writ did not pursue the form prescribed by the act of 2 *Will.* 4, c. 39. The direction of the writ in the form given by the act is "To the Marshal of the *Marshalsea* of our Court before us:" instead of which, it was directed "To the Marshal of our prison of the *Marshalsea*," leaving it uncertain whether the prison of the *Palace Court* or the *King's Bench* prison was intended.

1833.

STORE
v.
MOUNT.

The *Solicitor-General* and *Hughes* shewed cause.— They contended that the variance was not material, as it could not mislead. Though the act says the writs shall be according to the forms there given, it could never have been intended that a writ must conform to the act in every word and letter. The direction of a *Palace Court* writ is very different: it is “To the bearers of the virges of our household, the officers and ministers of our Court of our Palace of *Westminster*, and every of them.” In *Tidd’s Forms* (a) there are forms of writs directed to the Marshal very similar to the present: a *habeas corpus ad respondendum* against a prisoner, directed “To the Marshal of our *Marshalsea* before us;” another writ in the *Exchequer* directed simply thus—“To the Marshal of our *Marshalsea*, or his deputy there.” A writ directed to the sheriff instead of “sheriffs” of *London* was held not to be irregular on that account. *Clutterbuck v. Wiseman* (b), and *Tidd’s Practice* (c).

LITLEDALE, J.—I have sent in to the other Judges, and two of them are of opinion that the writ is not properly directed: the rule must, therefore, be made absolute.

Rule absolute.

vice of a declaration in ejectment on one of two tenants in possession is good service on both. In the present case *à fortiori* must the service on one be sufficient.

1833.
 }
 Doe
 d.
 HUTCHINSON
 v.
 ROB.

LITTLEDALE, J.—You may take your rule.

Rule granted.

DOE d. STEPPINS v. LORD.

GOULBURN, Serjt., shewed cause against a rule obtained by *Mansel*, for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice. It appeared by the affidavit, in answer to the rule, that the defendant's attorney requested the plaintiff not to proceed to trial, on the ground of such a proceeding being at that time inconvenient, as he was not then prepared with his defence. Accordingly, the plaintiff did not proceed. After that default, which was committed at his express desire and to oblige the defendant, he came to the Court to move for judgment as in case of a nonsuit. The plaintiff was not entitled merely to discharge the present rule, but to have the costs of coming to oppose it.

If a plaintiff does not proceed to trial pursuant to notice, at the defendant's request, he is not entitled to judgment as in case of a nonsuit.

Mansel supported the rule.

PATTERSON, J.—The present rule must be discharged, as it appears that the plaintiff did not proceed to trial pursuant to notice, solely at the instance of the defendant's attorney, and then that very attorney now comes and moves for judgment as in case of a nonsuit. The rule must, therefore, be discharged, under the circumstances, with costs.

Rule discharged, with costs.

1833.

DOE *d.* FORBES *v.* ROE.

It is not sufficient to state in the notice at the foot of a declaration in ejectment, that the tenant is "to appear in due time."

ADDISON moved for judgment against the casual ejector. The peculiarity in the case was, that the notice at the bottom of the declaration was "to appear in due time," instead of "to appear in *Michaelmas* Term next." The nature and object of the service was explained by the person effecting it.

LITLEDALE, J.—The tenant in possession cannot be supposed to know what is the practice of the Court, and therefore directing him "to appear in due time" gives him no information. The service is not sufficient, and the rule, therefore, cannot be granted.

Rule refused.

SARJEANT *v.* JONES.

If a defendant unnecessarily rules a plaintiff to enter the issue, he is not thereby deprived of his right

HUTCHINSON shewed cause against a rule for judgment as in case of a nonsuit, obtained by *Harrison*. The defendant had, notwithstanding 1 *Reg. Gen. H. 2 Will. 4*, ruled the plaintiff to enter the issue. By sect. 70

sary, the fact of its being entered can be of no consequence, or at all interfere with the right of the defendant to move for judgment as in case of a nonsuit.

1833.
SARJEANT
v.
JONES.

Rule discharged on a peremptory undertaking.

In re G. CHITTY, Gent., One &c.

(Before the four Judges.)

BUTT moved for a rule to shew cause why Mr. *Chitty*, an attorney of this Court, should not give up to the Rev. Mr. *Dowland* a promissory note for 300*l.*, and a policy of insurance on the life of Mr. *Dowland*. The motion was founded on an affidavit, stating that, in 1829, Mr. *Chitty* lent Mr. *Dowland* 300*l.* on the security of a note for that amount and a policy of insurance on the life of the borrower. In 1831, Mr. *Chitty* sold for Mr. *Dowland* a reversionary interest in a sum of 7000*l.* From the proceeds of this sale, Mr. *Chitty* paid himself the 300*l.* with interest and expenses, and the balance to Mr. *Dowland*. On this settlement the latter required the note and policy to be given up to him, when Mr. *Chitty* said he had left the note at home, but would either forward it on the next day, or destroy it. The note and policy were not sent, and nothing further was heard of them until a few months since, when the personal representatives of a banker at *Shaftesbury*, where Mr. *Chitty* lived, applied to Mr. *Dowland* for the amount of the note, and threatened to enforce their claim by an action. Then it appeared that Mr. *Chitty* had paid the note into his bankers as a security for money advanced to him.

Where an attorney has not fulfilled his engagement with respect to the loan of money, independent of his character of attorney, the Court will not summarily compel him to fulfil it.

Per Curiam.—We think it would be carrying the rule further than the authorities will warrant if we were to

1833.

In *Re*
CHITTY.

grant this motion. The misconduct of Mr. *Chitty* in not returning the note was not misconduct in his employment as an attorney, the transaction between the parties being not that of an attorney and client, but of borrower and lender.

Rule refused.

MILNER *v.* GRAHAM and Another.

Under 1 *Reg. Gen. H. T. 2 Will. 4, s. 74*, the defendant is entitled to the costs of all issues found for him, although they exceed the costs of those found for the plaintiff.

BUSBY applied for a rule to shew cause why the Master should not be directed to tax the defendant his costs, under the provisions of 1 *Reg. Gen. H. T. 2 Will. 4, s. 74*. To the declaration there were several pleas, all of which, with the exception of one, were found for the defendant. On the one found for the plaintiff, the jury gave a verdict for a farthing damages, and the Judge certified to deprive the plaintiff of any more costs than damages. On taxation a difficulty arose on the construction of the above rule, the words of which were, that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." As only one farthing costs was allowed to the plaintiff, it would of course be impossible to deduct

ON the last day of term the rule was made absolute, no cause being shewn.

1833.

MILNER
v.
GRAHAM.

In the following *Hilary* Term, *Justice* applied to open the rule, in order that the question on the construction of the rule of Court might be discussed.

PARKE, J.—The Judges have considered that rule, and we are of opinion that the object of it, as well as its intention, is, that the defendant should be allowed his costs on all issues found for him. There can be no necessity, therefore, for granting the rule.

Rule refused.

MYERS, Knt., v. COOPER.

W. H. WATSON shewed cause against a rule for discharging the defendant out of custody, on the ground of the plaintiff not having proceeded to trial or final judgment within three terms inclusive after declaration, pursuant to 1 *Reg. Gen. H. 2 Will. 4*, s. 85 (a). It appeared that the plaintiff in the third term inclusive after the declaration had given notice of trial, and set his cause down; but it did not come on either at the sittings during or after the term. The plaintiff had, however, done all in his power to proceed to trial within the time prescribed by the rules of the Court. If the trial had not come on, the delay was that of the Court, and not his. The defendant could not, therefore, be supersedeable.

If a plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with 1 *Reg. Gen. H. 2 Will. 4*, s. 85, and the defendant is not supersedeable.

Mansel, *contra*, contended, that the plaintiff ought to have given notice that he would take the cause as undefended at the last sittings in the term. If he had so done, the mere assertion by the defendant's counsel, that the cause was defended, would only have delayed the trial

(a) *Ante*, Vol 1, p. 194.

1833.
 MYERS
 v.
 COOPER.

of the cause until the first sitting after term. Nothing but special circumstances could have induced the Court to allow it to keep its place in the list. The plaintiff might, if he had thought proper, have then proceeded to trial, notwithstanding the pressure of business in the Court.

LITLEDALE, J.—It appears to me that the plaintiff has sufficiently complied with the rule, and therefore that the defendant is not supersedeable. The delay thus caused has not been produced by the carelessness of the plaintiff, but by the amount of business to be transacted in the Court. The delay has not been that of the plaintiff but that of the Court.

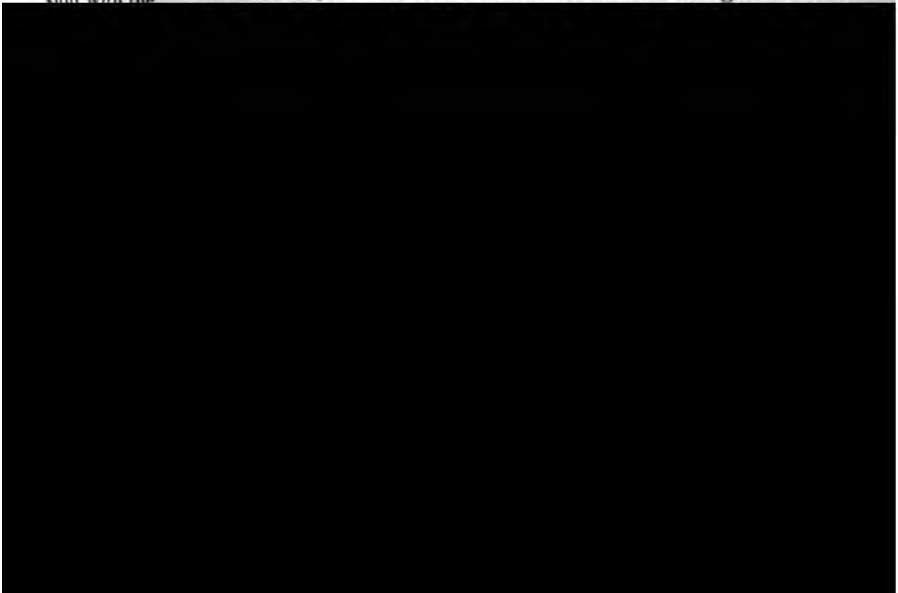
Rule discharged.



DONNIGER v. HINXMAN. BISHOP v. Same.

Where the sheriff applies for relief under the Interpleader Act, he need not in the affidavit in support of the application deny collusion with the

THIS was a sheriff's rule under the 1 & 2 Will. 4, c. 58, s. 6. It appeared that the sheriff, in the former of the two above cases, had levied on the goods of the defendant, and almost immediately after *a. fa.*, at the suit of the second plaintiff, was delivered to him. After he had seized, he received notice from the assignees of the



the Interpleader Act. By sect. 6 of that act it was provided, "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case." The provisions contained in sect. 1 of the act must be considered as incorporated with those of sect. 6. Relief under sect. 6 could only be given according to the provisions of sect. 1. The sheriff must be considered as placed in the situation of the stakeholder in sect. 1, and of course must make such an affidavit as is required by the provisions of sect. 1 from such stakeholder. By that section it is required that the stakeholder shall, "by affidavit or otherwise, shew that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that *such defendant does not in any manner collude* with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct." It is, therefore, clear, that, in order to entitle the sheriff to the relief given by this act, he ought to deny collusion with any of the parties. He cited *Anderson v. Calloway* (a). That

1833.

DONNIGER
v.
HINXMAN.

(a) *Ante*, Vol. 1, p. 636.

1833.
DONNICK
v.
HINXMAN.

was an application by the sheriff for relief under the present act. There Lord *Lyndhurst*, in alluding to the special circumstances of the case, observed—"The object of the act of Parliament was to afford relief to the sheriff, where two parties are claiming the property, by making them fight it out; but he must have either the goods or the money in his possession. It does not apply to a case where he has paid over the money to one of the parties. The condition in the first clause is, that the party does not collude, and is ready to bring the money into Court. The words are, 'that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct.' The obvious meaning of that clause is, that the party applying has got in his possession the property in respect of which he is sued, and to which he claims no right; and I think that this clause governs the whole act." The judgment of Mr. Baron *Bayley*, also, was to the same effect, though rather stronger. His Lordship observed, that "the act does not apply to such a case as this, where the sheriff has paid over the money. The powers and authorities to be exercised by the Court for the relief of the sheriff, are in the

v. *Robert Allen* (a) was to the same effect. There, Mr. Baron *Bayley* said, "It is not at all clear that the sheriff ought not to deny collusion."

1833.
 DOWNIGER
 vs.
 HINXMAN.

LITTLEDALE, J.—It does not appear to me that it is necessary for the sheriff to deny collusion, although it may be proper that a private person, not standing in the situation of a public officer, should be required to make such a denial (b).

Erle appeared for the plaintiff *Bishop*.

Boileau, for Major *Campbell*.

Follett, for the landlord.

No one appeared for *Donniger*.

W. H. Watson contended, that, as *Donniger*, who was one of the claimants, he being an execution creditor, had been served with the sheriff's rule, and did not appear, the Court should bar his claim.

LITTLEDALE, J.—*Donniger* is an execution creditor, and the question between him and *Bishop* is, who has the priority of execution. He does not stand in the situation of a *third* party claiming the goods seized by the sheriff; but the power of the Court to bar claims is only in the case of a *third* person. By sect. 3 of the act, it is provided "that if such *third* party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appear-

(a) *Ante*, p. 11.

(b) In the following *Easter* Term Mr. Justice *Taunton* pro-

nounced a similar decision in the case of *Dobbins v. Green*.

1833.
 {
 DONNIGER
 v.
 HINXMAN.

ance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators, saving, nevertheless, the right or claim of such third party against the plaintiff." The Court, therefore, has no power to interfere and bar the claim of an execution creditor, as the act only applies to the case of a *third* party claiming.

It afterwards appeared that *Donniger* had died since the service of the rule, and therefore the whole case stood over until the following term, when arrangements were made for deciding the question between the parties.

DOE *d.* NORMAN *v.* ROE.

The Court will not grant judgment against the casual ejector, when, from the affidavit in support of the motion, it ap-

MOTION for judgment against the casual ejector.—
 The affidavit stated, that, before the first day of the present term, namely, on the 4th of *October* last, the deponent affixed a copy of the declaration and notice, by nailing the same against the exterior wall of the dwelling-house.

been deserted ever since the last payment of rent; that deponent had been informed, and verily believed, that the leasee was, since that time, dead.

1833.
Dor
d.
NORMAN
v.
ROE.

LITTLEDALE, J.—Here is a mere vacant possession, and the proper proceedings with respect to it have not been adopted. If I were to allow this, I should be opening the way to great irregularities.

Rule refused.

SPRIGGE, Gent., One &c. v. RUTHERFORD.

(Before the four Judges.)

THIS was an action by an attorney for his bill, amounting to 7l. 10s. The plaintiff gave the defendant notice that he should take it as an undefended cause on *Tuesday*, the 2nd day of *December*. On that day the record having been taken down, the Lord Chief Justice, after trying several causes in the paper, intimated at three o'clock that he would then take undefended causes: the names of all the causes were then called over, and, upon this cause being called, the defendant's counsel stated that it was defended, and it was not tried. On the following day the Lord Chief Justice went into the city to try undefended causes, and returned to *Westminster* on the *Thursday*. On the *Wednesday* evening the defendant's counsel attended at the Marshal's office to inspect the list of causes for the next day, and, though there were several undefended causes in the list, this cause was not set down. No notice was given by the plaintiff that the cause would be taken on *Thursday* as an undefended cause, nor was it put into the paper of the day. The defendant's attorney, believing that the cause would come on in the regular course, did not attend. The brief remained in the hands of counsel. The plaintiff got the cause tried

Where a plaintiff gave notice that he should take the cause down to trial as an undefended cause, and when it was called on the defendant's counsel said it was defended, whereupon it was not tried; but the plaintiff again took the record down and got the cause tried as undefended, without any new notice or setting it down in the paper, the Court granted a new trial, without payment of costs.

1833.
SPRIGGE
v.
RUTHERFORD.

on *Thursday*, without the knowledge of the defendant's attorney or counsel, as an undefended cause, and obtained a verdict. Upon an affidavit of these facts, and that the defendant had a good defence upon the merits, *S. Hughes*, on the part of the defendant, obtained a rule *nisi* for setting aside the verdict, and for a new trial.

Busby shewed cause.—He produced long affidavits to shew that the defendant could have no defence.

TAUNTON, J., observed, it was not usual to answer affidavits of merits in that manner, for it would be trying the cause.

Busby.—The new trial ought at least to be upon payment of costs.

S. Hughes, in support of the rule, contended that the plaintiff was clearly irregular in getting the cause tried behind the back of the defendant, and that he should either have set the cause down in the paper of the day, or given notice to the defendant's attorney that the record would be taken down on the *Thursday*. He referred to a rule of this Court (*a*), which directed that "every cause

Per Curiam.—We think the plaintiff did wrong in getting the cause tried in the way he did; and the rule for a new trial will therefore be made absolute, without payment of costs.

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SPRIGGE
v.
RUTHERFORD.

Rule absolute.

DOE *d. FRITH v. ROE.*

DOWLING moved for judgment against the casual ejector.—It was the case of a vacant possession; and the peculiarity in the case was in the mode of making the entry. The usual mode of effecting the formal entry in such a case was by putting the finger into the key-hole; but here there was no key-hole in the door, and therefore the person seeking to make the entry could not put his finger in; the entry, therefore, was by standing on the threshold of the house, and laying hold of an iron bar attached to the door.

The usual entry in cases of vacant possession will in certain cases be dispensed with.

LITTLEDALE, J.—That will do, under the circumstances.

Rule granted.

WILSON's Bail.

WALLINGER opposed bail, on the ground that he was misdescribed in the notice of justification. The notice of justification described the bail as "a housekeeper." On examination, however, he admitted that he was not a "housekeeper," but a mere "lodger." On further examination, however, he stated that he had a freehold.

A notice of bail describing him as a housekeeper is insufficient, if he is only a lodger, although on examination it appears that he is a freeholder.

Comyn, in support of the bail, submitted, that although the bail had been described as a housekeeper in the notice

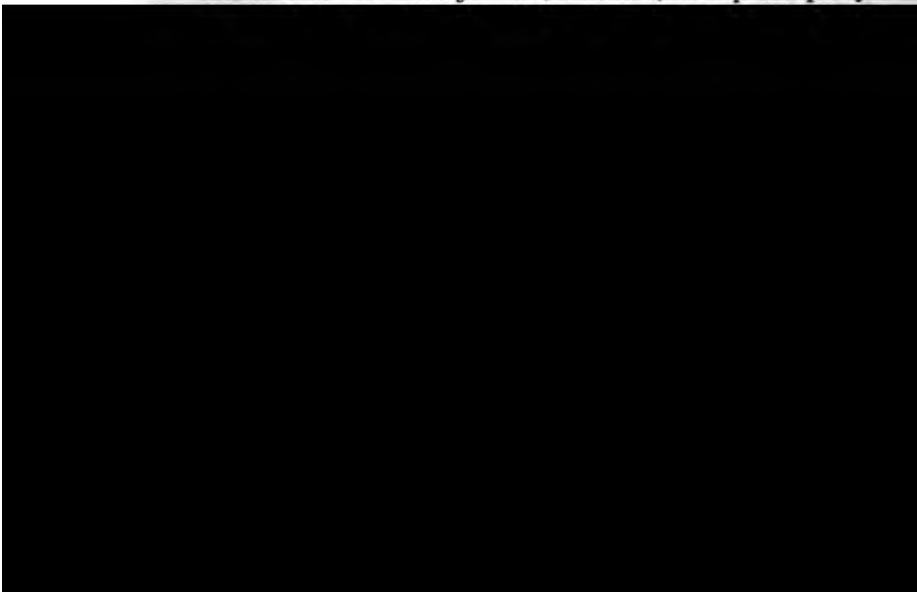
1833.

WILSON'S
Bail.

of justification, yet, as it appeared on the bail coming up to justify that he was a freeholder, it was sufficient.

Wallinger contended, that, as the rule of *Trinity* Term, 1 *Will.* 4, required the notice to state whether the bail was a housekeeper or freeholder, it could not be said that there had been a compliance with that rule, when a person who was a lodger had been described as a housekeeper. If he had been described in the notice of justification as a freeholder, it would have been different. If he were a freeholder, that was a sufficient qualification, in one point of view, to become bail. But the mere fact of the bail's being a freeholder appearing on the examination could not render the notice good. Whether he was a freeholder or a housekeeper must appear in the notice. Proof of the bail being a "freeholder" could be no support of the description "housekeeper" in the notice of justification.

LITTLEDALE, J., was of opinion that the bail had been improperly described in the notice of justification. He was a lodger, and he was described as a housekeeper. The fact of his being a freeholder could make no difference. Perhaps it might have been different under the old rules; but the rules of *Trinity* Term, 1 *Will.* 4, were peremptory.



on a writ of *capias*, and that the sheriff had been required by a Judge's order to return the writ. His return was, "*cepi corpus*." A Judge's order to bring in the body was then obtained, which expired during the vacation. This order was not obeyed until the 2nd November, the first day of *Michaelmas* Term, when special bail was put in, and they forthwith rendered the defendant. On the 3rd of November, the Judge's order was made a rule of Court, and an attachment against the sheriff for not bringing in the body obtained at the same time.

1833.
 {
 REX
 v.
 The Sheriff of
 MIDDLESEX.

Holt afterwards obtained a rule *nisi*, for setting aside the attachment.

Cause was now shewn against that rule by *Miller*. He contended, that the attachment was clearly regular, although the defendant had been rendered before it was obtained. By 13 Reg. Gen. M. 3 Will. 4, it is ordered, "That in case a Judge shall have made an order in the vacation for the return of any writ issued by authority of the said act, or any writ of *ca. sa.*, *fi. fa.*, or *elegit*, on any day in the vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime." The fact, therefore, of the defendant having been rendered before the attachment was obtained, could not operate to purge the contempt of the sheriff.

PARKE, J.—It is clear from the language of the rule, that rendering the defendant, when obedience in due time has not been yielded by the sheriff to the order, does not

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} **REX**
v.
The Sheriff of
MIDDLESEX.

prevent the consequence of his contempt, although the attachment is not obtained until after obedience has been yielded.

Holt, in support of the rule, submitted, that the rule for setting aside the rule for an attachment ought to be made absolute; first, because the sheriff had done all in his power to purge the contempt; and, secondly, that the plaintiff not having declared, no injury had accrued to him, for he had not lost a trial.

Per Curiam.—It is clear that the contempt is not purged by the render, even though it has been made before the Judge's order was made a rule of Court, or an attachment obtained for disobedience to the Judge's order. The attachment, however, may be set aside on payment of costs.

Miller contended, that the attachment ought to stand as a security.

Per Curiam.—As the plaintiff has not declared, and has consequently not lost a trial, we think it should not stand as a security (*a*).

PRICE v. THOMAS JAMES.

1833.

HALL shewed cause against a rule *nisi* for setting aside an order of reference obtained by *Mansel*, on the ground that, in the order of reference, the names of the defendant were transposed. The original action brought was "*Price v. Thomas James*," but in the order of reference the names of the defendant were put "*James Thomas*." That transposition, he contended, was immaterial, and he cited *Doe d. Phillip Worthington and James Worthington v. Butcher* (a). In that case the declaration was intitled "*Doe on the demise of Phillip Worthington and James Worthington v. Butcher*;" and the affidavit of service described the cause as "*Doe on the demise of James Worthington and Phillip Worthington v. Butcher*." The Court there held that this was a mere clerical mistake, and granted a rule for judgment. In *Elvin and Another v. Drummond* (b), the plaintiffs declared on a writ of the King. The writ produced in evidence was in the name of *George the 3rd*, but tested in the name of *Best*, Chief Justice, and indorsed with the date of 1826. The Court there were clearly of opinion that the writ being tested in the name of the present Chief Justice, and being indorsed with the date 1826, there was no material variance between the writ declared on and that produced in evidence. If, however, the variance were fatal, the plaintiff was estopped from taking any objection, as he had acted on the order by appearing before the arbitrator. But, if the Court should be of opinion that the plaintiff was in a situation to take advantage of this mistake, it might be amended. He cited *Wright qui tam &c. v. Horton* (c). There the entry of the *similiter* or the plea of *nil debet* was in the name of the defendant instead of the plaintiff. The Court there al-

Where the Christian and surname are transposed by mistake in an order of reference, the Court will allow that mistake to be amended.

(a) 2 Chit. Rep. 174.

(b) 12 Moore, 523; 4 Bing. 278.

(c) 6 Mau. & Sel. 50.

1833.

PRICE
v.
JAMES.

lowed an amendment in the names after a verdict for the plaintiff. In that case Lord *Ellenborough* observed, "On referring to the case of *Sayer v. Pocock (a)*, I find that Lord *Mansfield* considers a similar omission to the present as an omission of the clerk." Under any circumstances, therefore, the order of reference ought not to be set aside.

Mansel, in support of the rule, contended, that the order of reference referred to a cause not in existence. The issue was joined between "*John Price and Thomas James*" but the order of reference referred a cause between "*John Price and James Thomas*" the case itself, therefore, had never been before the arbitrator. One of the consequences resulting from this error in the name of the cause would be to prevent any of the witnesses who had appeared before the arbitrator, and who might have made wilful false statements, from being punished for perjury. He cited *Rex v. Cohen (b)*, where a co-plaintiff died after issue joined, and the death was not suggested, according to the 8 & 9 of *Will. 3*, c. 11, s. 6, and a trial afterwards took place; it was held that such trial was extra-judicial, and consequently no perjury could be assigned upon any false evidence given at such trial. Lord *Ellenborough* there observed, "I am of

which he could not waive, because the whole proceeding was a nullity, and no act of the plaintiff in appearance acquiescing in it could render it available. In *Garratt v. Hooper* (a), it was held, that, if a plea in abatement be a nullity, no act of the plaintiff apparently acquiescing in it will be construed into a recognition of it. There the distinction was taken between an irregularity and a nullity; for Mr. Justice Taunton there said, "There is this difference between an irregularity and a nullity: an irregularity may be waived, but a nullity cannot." Here also the proceeding before the arbitrator was a mere nullity, and the attendance by the plaintiff before him could not render it valid. It had also been urged that the error in this case might be amended; but, in *Rawtree v. King* and another (b), all matters in difference in the cause were agreed to be referred, and the associate by mistake drew up the order of reference generally as to all matters in difference between the parties. The Court there said, that they could not interfere; that the order of reference must be considered as a mere nullity, and that the effect would be that the parties must go down to another trial. If it should be said that the plaintiff should apply to set aside the award instead of the order of reference, there was no foundation for that argument. In the case of *Doe d. Lord Carlisle v. Bailiff and Burgesses of Morpeth* (c), it was decided, that if upon a reference either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference; but he cannot impeach the award. He submitted, therefore, on the authority of the cases cited, that the present rule must be made absolute for setting aside the order of reference.

LITLEDALE, J.—My present impression is, that the

(a) *Ante*, Vol. 1, p. 28.

(b) 5 J. B. Moore, 167.

(c) 3 Taunt. 378.

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v.
JAMES.

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PRICE

F.

JAMES.

error in the order of reference may be amended. I will, however, look into the cases and state my opinion another day.

Cur. adv. vult.

LITLEDALE, J.—I have looked into the cases and consulted the other Judges, and we are of opinion that the name may be amended.

Amendment allowed.

EAGLEFIELD v. STEPHENS.

Where a bail has misdescribed his place of residence on justification, but has been allowed to pass, the Court will not set aside the rule for the allowance of the bail, but he may be indicted for perjury.

WHITE moved for a rule to shew cause why the rule for the allowance of the bail in this case should not be set aside, on the ground that one of the bail had mis-stated his place of residence. He cited *Brown v. Gillies (a)*, where the rule for the allowance of bail was discharged, with costs to be paid by the defendant, on an affidavit that the bail had perjured himself, on his justification, in swearing that an action, in which he had been bail, had been compromised. There were other cases to the same effect.

Ex parte PITT.

1833.

(Before the four Judges.)

MR. PITT (in person) applied for a rule to shew cause why certain attornies, whose names he mentioned, should not be required to answer certain matters contained in an affidavit made by the applicant, and on which he moved.

An application for a rule requiring an attorney to answer the matters of an affidavit must be made by a gentleman at the bar.

Lord DENMAN, C. J., (after consulting the other Judges and the Master of the Crown Office).—The motion against an attorney being in the nature of a criminal information, the Court requires that it should be made by a gentleman at the bar; and it cannot be made in person. Otherwise, we have not the sanction of a barrister for the propriety of such an application. We cannot, therefore, hear you make this motion. The only case in which it appears that the Court ever interfered, where the application was made in person, was where a party demanded protection of the Court against an attorney; and, as it then appeared on his affidavit that the attorney had been guilty of great misconduct, the Court, of its own accord, directed that he should answer the matters stated in the affidavit of the applicant. That case is, however, different from the present; as here the direct and primary object of the application is that the attorney should answer the matters contained in the affidavit.

Rule refused.

FITCH v. GREEN.

CROWDER obtained a rule to shew cause why the Master's taxation should not be reviewed. Notice had been previously given to the opposite party that such a motion would be made.

Where a party shews cause successfully in the first instance, he is not entitled to costs.

1833.

FITCH
v.
GREEN.

PARKE, J., was of opinion that the rule ought to be discharged.

Follett, who had appeared on the notice to shew cause in the first instance, now applied for the costs of so appearing.

PARKE, J.—As you appeared in the first instance to shew cause, you are not entitled to the costs of appearing.

Rule discharged, without costs.

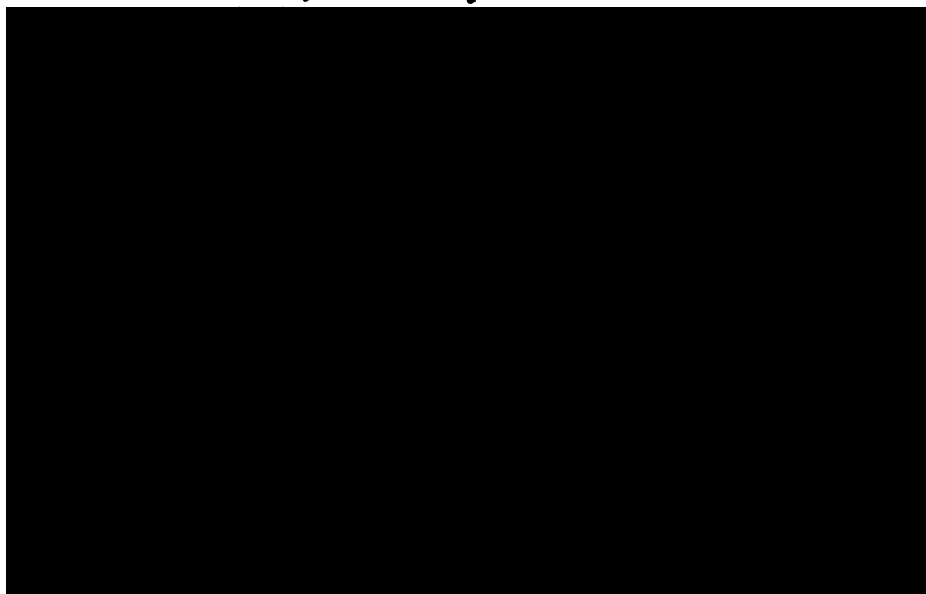


REX v. FORBES and Others.

The venue cannot be changed in an indictment for conspiracy, until issue is joined.

V. LEE moved for a rule to shew cause why the venue in this case should not be changed from *London* to *Staffordshire*, on the ground that all the witnesses for the defendants resided in that county. It was an indictment for conspiracy, and the affidavits disclosed circumstances of peculiar hardship upon the defendants.

PARKE, J.—Is issue joined in the case?



1833.

DOE *d.* COURTHORPE *v.* ROE.

ARMSTRONG moved for judgment against the casual ejector. The affidavit on which he moved stated the service to have been under these circumstances:—The person endeavouring to effect the service had gone to the premises, and presented the declaration to the wife of the tenant in possession. She refused to take it, and the deponent then left it on a table in the house. He having explained the nature and object of the declaration, left the house, and the wife, taking up the declaration, threw it after him. He then picked it up and affixed it on the most conspicuous part of the premises.

Service of a declaration in ejectment.

PARKE, J.—That is sufficient.

Rule granted.

DOE *d.* WETHERELL *v.* ROE.

FOLLETT moved for judgment against the casual ejector. The person making the affidavit on which the motion was founded had gone to the premises in question, where he found the son. To him he explained the nature of the declaration, and left a copy of it with him. The son stated that his father was not at home, and would not return before midnight. He called the next day, and saw the wife of the tenant in possession. On inquiring of her about her husband, she stated that he had gone out, but she did not know where.

Service in ejectment.

PARKE, J.—I think the affidavit states enough to entitle you to a rule to shew cause.

Rule *nisi* granted.

1834.

Hilary Term,

IN THE FOURTH YEAR OF THE REIGN OF WILL. IV.

JONES v. JACOBS.

Where security for costs has been given, the defendant will not be entitled to fresh security if the sureties become insolvent.

IN this case the defendant had applied for and obtained a rule requiring the defendant to give security for costs. Sureties for costs to the satisfaction of the Master were accordingly given. These sureties afterwards became insolvent. A rule *nisi* was obtained that fresh security for costs might be given. Time was taken by the Court to consider whether the application could be granted.

PARKE, J.—I have consulted the other Judges, and we are all of opinion that this rule cannot be made absolute. We think, that, when once the sureties for costs are obtained, there is an end of the matter; and, therefore, that you cannot obtain fresh sureties, on the ground of the previous ones having become insolvent. The present rule must, therefore, be discharged.

Rule discharged.

COSGRAVE v. EVANS.

1834.

CROWDER moved for a rule to shew cause why the Master should not review his taxation, on the ground that he had allowed for the attendance of several witnesses for too long a period. It was a special jury cause, and was tried at the last *Exeter* Assizes. It did not come on until the fourth day of the assizes; but the Master allowed for the attendance of thirty witnesses from the beginning of the assizes, although the practice had been, as was sworn by an old practitioner, not to take the special juries until the third or fourth day of the assizes. This practice had prevailed for above thirty years. It was, therefore, unnecessary for all these witnesses to have been in attendance until it was probable the cause would come on; the allowance for them by the Master was unreasonable. It was, therefore, fit that he should review his taxation.

A plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and may therefore have the costs of their attendance previous to the trial.

PARKE, J.—It appears to me that the Master has done right in allowing the costs of these witnesses. Supposing the Judge, in the exercise of his discretion at the assizes, should think fit to take the special jury causes first, the common juries not being ready, the plaintiff then might be compelled to withdraw his record, or submit to a nonsuit, or have a verdict against him in consequence of the witnesses not being in attendance. I do not think an attorney would do his duty to his client if he had not all his witnesses in attendance from the commencement of the assizes. The Master (*Goodrich*) says, that, as it is so uncertain at what time the special juries will be taken, it is impossible for the taxing officers to make any distinction on that ground. These facts were before the Master; and I dare say he has properly exercised his discretion as to the allowance which ought to be made for the attendance of those witnesses.

Rule refused.

1834.

DOE *d.* MORTLAKE *v.* ROE.Service in eject-
ment.

ERLE moved for judgment against the casual ejector. The deponent, endeavouring to effect the service, had gone to the premises in question, but found the door closed. He knocked, but gained no admission. He looked through the window, and saw the niece of the tenant in possession. He again knocked, but could not get in. He then explained, through the door, the nature and object of the service, and pasted the declaration against the door, and came away. Two conversations afterwards took place between the deponent and the attorney of the tenant, from which it appeared that the declaration had been brought to that attorney.

PARKE, J.—You may take a rule; but not absolute in the first instance, because it does not appear that the tenant in possession or his wife was then in the house.

Rule *nisi* granted.

WENHAM *v.* FOWLE.

1834.

JONES *v.* DYER.

ARCHBOLD applied, on the part of the plaintiff, to be allowed to enter an appearance for the defendant pursuant to sect. 3 of the 2 & 3 Will. 4, c. 39. A *distringas* had been granted by the Court against the defendant. When the sheriff proceeded to levy under the writ, he only found 2*s.* 6*d.* worth of property on the premises. This amount he had taken. It was necessary that this fact should be mentioned to the Court, as the writ of *distringas* in the notice attached to it mentioned the sum of 40*s.* as having been levied by the sheriff. The fact of only 2*s.* 6*d.* having been levied could make no difference, as he had taken all that he could find on the premises.

In executing a *distringas*, it is sufficient that the sheriff should take all the property on the premises, although it amounts to less than 40*s.*; and, on the sheriff's return, the plaintiff will be entitled to enter an appearance for the defendant.

PARKE, J.—You may enter an appearance for the defendant.

Rule granted.

PELL *v.* JACKSON.

MILLER moved for a rule to shew cause why the writ of summons in this case should not be set aside, on the ground that the form of action was not sufficiently described according to the exigency of the 2 & 3 Will. 4, c. 39. The form of summons given in the schedule required that the form of action which the plaintiff had adopted should be stated correctly. Here, the summons described it to be an action of "libel." This was not a sufficient description of the cause of action. To an unlearned person it might not be certain whether the proceeding was or was not a suit in the ecclesiastical court. The form given in the schedule referred to the class of action; but here, only an instance of that class was given to describe the nature of

"Libel" is a sufficient description of the form of action in a writ of summons.

1834.
 PELL
 v.
 JACKSON.

the suit which had been commenced against the defendant. He cited *King v. Skiffington (a)*, from which it appeared that the description of the form of action must be strictly adhered to.

PARKE, J.—The action of libel can only be an action on the case. I think, if an action “on promises” will do, an action of “libel” will do. It does not appear by the act of Parliament to be necessary that it should be described as an action on the case on promises. Here, it cannot be any other than an action on the case. It sufficiently states to the defendant the nature of the action to which he has to appear, and that seems to have been the object of describing the form of action. I think, therefore, it will do.

Rule refused.

(a) *Ante*, Vol. 1, p. 686.

REX v. BOOKER.

In order to entitle a defendant, on a charge of fe-

PETERSDORFF moved for a *certiorari*, and a rule to shew cause why the defendant in this case should not be admitted to bail before a magistrate in the country.

the case, that he is poor, and cannot afford the expense of being brought up to *London* on a *habeas corpus* in order to be bailed. You may take your *certiorari*, and your rule *nisi*, accordingly.

1834.
 REX
 v.
 BOOKER.

Rule *nisi*, accordingly.

WELLS v. SECRET.

BYLES shewed cause against a rule obtained by *Petersdorff* to set aside a judgment for irregularity. The alleged irregularity was, that the judgment had been signed too soon. The time for pleading expired on the 7th of *January*, and, on that day, a summons was taken out to plead several matters, and made returnable at eleven o'clock on the 8th, the hour at which the Judgment Office opens. After eleven o'clock on the 8th, the plaintiff's attorney, who did not attend the summons, signed judgment. He contended that the judgment was regular, as the summons to plead several matters could not be a stay of the plaintiff's proceedings when the time for pleading was out.

A summons to plead several matters is a stay of proceedings, if it is returnable at the time the Judgment Office opens on the day after the time for pleading expires.

PARKE, J.—The only point in the case is, whether the summons to plead several matters, returnable at eleven o'clock on the day after the time for pleading has expired, is a stay of proceedings when the clock strikes eleven, that being the hour at which the Judgment Office opens. In case of obtaining time to plead, it would operate as a stay of proceedings. The question, therefore, is decided, unless there is a difference between a summons for time to plead, and a summons to plead several matters.

Byles.—The defendant took out no summons for time to plead, but merely a summons to plead several matters.

1834.

WELLS

SECRET.

It is true, that, in the summons to plead several matters, there are the words, "and why in the meantime proceedings should not be stayed." Those words, however, might be discarded as surplusage, as they are mere words of form, introduced into the summons, which could not entitle the defendant to a stay of proceedings if he were not otherwise entitled to it.

PARKE, J.—Is not the effect of this summons the same as if the defendant had taken out two summonses, one to plead several matters, and the other for further time to plead? It appears to me to be the same in substance as two summonses. It having been made returnable at eleven o'clock on the day after that on which the time for pleading expired, it operated as a stay of proceedings when that hour struck. The plaintiff, therefore, had no right to sign judgment after eleven o'clock, the Judgment Office not opening till then. The judgment, therefore, must be set aside, without costs, as there was some nicety in the point (a).

Rule absolute, without costs.

(a) Mr. Tidd, in the 9th edition of his *Practice*, p. 470, has this passage:—"When the object of filing common bail, &c., it will not in general operate as a stay of proceedings." For this, however,

purpose. The rule directed that it should be delivered to the plaintiff, his attorney, or agent. The demand, however, was made by a clerk to the plaintiff's attorney. The question was, therefore, whether disobedience to such a demand would subject the attorney to an attachment as for a contempt.

1834.
Ex parte
 FORTESCUE.

PARKE, J.—That will not do. The rule is to deliver up the bond to the plaintiff, his attorney, or agent. A demand should therefore have been made by one of those three persons, in order to bring the attorney into contempt. Here the demand was made by the attorney's clerk, who is not entitled to receive it from him. Nor is the attorney bound to deliver it to him. The attorney, therefore, by not delivering it on such a demand, is not guilty of a contempt, and is therefore not liable to an attachment.

Rule refused.

DOE *d. VISGER v. ROE.*

THEOBALD moved for a judgment against the casual ejector. The deponent, who made the affidavit on which he moved, had gone to the premises and seen the tenant in possession. He offered the declaration to the tenant, who refused to take it. He then laid it on a chair in the room, and explained the nature and object of the service. The tenant then left the room, stating that he would not take any paper from the deponent, or any other person on the part of the lessor of the plaintiff.

Service in
ejectment.

PARKE, J.—That will do; you may take your rule.

Rule granted.

1834.

Ex parte PHILCOX.

If an attorney has practised abroad during a period for which he has not taken out his certificate, he may be re-admitted without payment of arrears of duty or fine.

J. WILLIAMS moved to re-admit an attorney without payment of fine or arrears of duty. The attorney had discontinued to take out his certificate for four years, and during that period he had not practised in this country, although he had practised abroad.

PARKE, J.—That is sufficient to entitle him to re-admission without payment of arrears of duty or fine. The act only applies to practising in this country. Let him be re-admitted, therefore, without paying any fine or arrears of duty.

Re-admitted accordingly.

WILSON v. BACON and Others.

After a lapse of ten years, it is too late to object that a *habeas corpus ad satisfaciendum*, on which the defendant is charged in execution, was not indorsed with the number roll.

MANSEL moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the *habeas corpus ad satisfaciendum*, on which he was charged in execution, was not indorsed with the number roll. A judgment was obtained against the de-

WHITE v. WESTERN.

1834.

DOWLING moved for a *distringas*.—The affidavit in support of his motion stated that three calls had been made, and the two latter, pursuant to appointments, together with the requisite explanation. The copy of the summons was left at the third call; eight days had elapsed since then, and no appearance had been entered. It was clear from the affidavit that the defendant was keeping out of the way to avoid service of the process; and the only peculiarity in the case was, that the two latter calls had been made on the same day.

The attempts to serve a summons, in order to obtain a *distringas*, may be made in the same day, if it appear that the defendant is purposely keeping out of the way.

PARKE, J.—That is of no consequence. It is only necessary to shew, that, when the calls are made, the defendant is keeping out of the way.

Rule granted.

Ex parte JONES.

STEER applied to re-admit an attorney, if, on the statement of circumstances, it should appear necessary that he should be re-admitted. He had been admitted already for more than a year, but had never taken out his certificate, nor had he practised. He had given the usual notices previous to re-admission; and the application now was, that he should be re-admitted if the Court should be of opinion that re-admission was necessary. He contended that re-admission was unnecessary; for the rule of Court only contemplated the case of attornies who had been admitted, taken out their certificate, and afterwards ceased to take it out.

Where an attorney has been admitted, but has never taken out his certificate, he is entitled to take it out without re-admission.

PARKE, J., (after referring to *Master Chapman*).—It appears to me that he requires no re-admission; the rule

1834.

Ex parte
JONES.

only applies to those cases in which an attorney has taken out his certificate after admission, and then ceased to take it out.

FURSEY *v.* PILKINGTON.

Where a defendant is resident in the *West Indies*, a judgment may be signed against him on a warrant of attorney, if seen alive four months before.

BUTT moved to enter up judgment on an old warrant of attorney. The affidavit on which he moved stated, that the defendant was seen alive in *September* last, in the year 1833, in the *West Indies*, and that it was believed that he was still living, and on service there.

PARKE, J.—I think that will do, as, from the distance no one can make an affidavit of his being alive within the term, nor can you receive a letter from him dated within the term. You may, therefore, take a rule for judgment, and, if it turns out that he was not alive within the term, his representative may apply to set it aside.

Rule granted.

DOE *d.* FORBES *v.* ROE.

SHEPHARD v. HALLS.

1834.

STEER moved for a rule to shew cause why the damages sustained by the plaintiff, in consequence of the trespasses stated in the declaration, should not be entered for 5*l.*, or why a writ of inquiry should not issue, in order to assess the amount. It was an action of trespass, and the defendant pleaded two special pleas of justification, without the general issue. At the trial, a general verdict was found for the defendant. Afterwards, on application to the Court, judgment was given for the plaintiff *non obstante veredicto*. The plaintiff, therefore, was entitled to some damages; and he applied to the defendant to be allowed to enter his damages at 5*l.*, as that was the sum the plaintiff had paid to redeem his goods when seized and carried away, at the time the trespass was committed.

Where a plaintiff has obtained a judgment *non obstante veredicto*, he may execute a writ of inquiry to assess his damages, without leave of the Court.

PARKE, J.—The defendant is not bound to consent to your entering your judgment for that amount; but, if he will not consent that you should do so, you require no leave of the Court to execute a writ of inquiry. As you have got judgment *non obstante veredicto*, you are entitled to execute your writ, you having, in fact, judgment on all the pleas. If any of the pleas had been good, the defendant would have been entitled to retain his verdict on them; and there must have been a *venire de novo*. If the defendant will not pay the 5*l.* you may have your writ of inquiry without applying to the Court.

Rule refused.

1834.

LEVY v. CHAMPNEYS.

Where a sheriff has seized goods under a *fi. fa.*, and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the 1 & 2 *Will.* 4, c. 58, s. 6.

THIS was a sheriff's rule, obtained under the 1 & 2 *Will.* 4, c. 58, s. 6, requiring the execution creditor and claimant under a bill of sale to appear before the Court, to abide such order as shall be made for the adjustment of their respective claims.

Hutchinson appeared on behalf of the execution creditor, and stated that his client was ready to give the sheriff an indemnity, so that the question might be tried without any injury or expense to that officer. This indemnity, however, the sheriff had thought proper to refuse; because, as he said, it would not be safe for him to accept the indemnity.

Holt appeared on the part of the sheriff; and contended that the sheriff was not bound to accept an indemnity, but was entitled to be protected by the Court, under the Interpleader Act, notwithstanding his refusal.

Wightman appeared on the part of the holder of the bill of sale.

1834.

Ex parte CRISP.

ERLE shewed cause against a rule requiring a Mr. *Pulmer*, an attorney, to deliver up the will of a person named *Hudson*, deceased, to a woman named *Crisp*. The affidavit on which the motion was obtained stated that Mrs. *Crisp* had lived several years with the deceased, previous to his death, in the capacity of housekeeper; and that by his will he appointed her sole legatee of all his property. After his death his son took out administration, and turned her out of the house. The will of the deceased was left in the hands of Mr. *Pulmer*, the attorney; and the object of the application was to obtain possession of this will, in order that it might be proved in the Ecclesiastical Court. In answer to this application, it was sworn by Mr. *Pulmer*, that, shortly before the death of the testator, the will was given by the latter to him for the purpose of being destroyed. Mr. *Pulmer* accordingly took the will home with him; but, before he had destroyed it, he heard of the testator's death; he then drew his pen across the will, and retained possession of it. Since that, the will had been demanded of him by Mrs. *Crisp*; but, not conceiving that she had a claim to it which he could recognise, he had refused to deliver it to her. He was at all times ready to shew it; but no request for that purpose had ever been made. The character of attorney and client, or any privity of any kind, never existed between her and Mr. *Pulmer*; and therefore the Court had no authority to interfere to compel him to deliver up the will.

An attorney with whom a will has been deposited by the testator will not be compelled to deliver it up to the sole legatee under it.

Wightman, in support of the rule, contended that Mr. *Pulmer* was employed in this matter, because he was an attorney; and, therefore, that it came within the principle of the case of *Re Aitkin* (a).

(a) 4 B. & Ald. 47.

1834.

Ex parte
CRISP.

PARKE, J.—This will never came into the hands of Mr. *Pulmer* in his character of attorney. The testator might have delivered his will, for the purpose of its destruction, into the hands of any one, as well as of an attorney. Again, there is nothing like the relation of attorney and client between Mrs. *Crisp* and Mr. *Pulmer*. I think, therefore, that it was not his duty to deliver it up to her. It appears, that the testator having delivered the will with directions to destroy it, he took it home with him for that purpose; but, hearing of the testator's death, he merely drew his pen across it. The proper course is this, that you must establish the will in the Ecclesiastical Court, before you can do any thing on it. The present rule must, therefore, be discharged; and Mr. *Pulmer* will undertake to shew the will to Mrs. *Crisp*. That is more than she is entitled to obtain. Mr. *Pulmer* was not bound to deliver it up, or to shew it, because there was no relation of attorney and client between him and her. The Court never interferes, except where there is the relation of attorney and client. Here, there was no such relation. The rule must also be discharged with costs; because she might have obtained all she has got now on coming to the Court, by merely applying to Mr. *Pulmer* to be allowed to see it.

issue, with several pleas of justification. At the trial, the jury found for the defendant on the plea of the general issue, and no evidence was given on either side with respect to the pleas of justification. The *postea* was indorsed thus—"Verdict for the defendant on the general issue, and for the plaintiff on the other issues." The Master (*Goodrich*) taxed the plaintiff his costs of the pleadings on the justifications, and of the witnesses who were in attendance with respect to them, on the statute of the 4 & 5 *Anne*, c. 16, s. 5, on the ground that the Judge at *Nisi Prius* had not certified that the defendant had probable cause for his pleas. This taxation was incorrect, because, as a verdict was found for the defendant on a plea which went to the whole cause of action, he was entitled to the general costs of the cause, and the plaintiff to none. If the plaintiff is entitled to any thing, it is only to the costs of the pleadings. The Master taxed the defendant his costs at 79*l.*, and the plaintiff's at 71*l.* With respect to the costs of several pleas, it is provided by the 4 & 5 *Anne*, c. 16, s. 5, as to double pleading, "That if any such matter shall upon a demurrer joined be judged insufficient, costs shall be given at the discretion of the Court, or, if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the Judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him." In order, therefore, for us to have prevented the plaintiff from obtaining costs on these pleas, the verdict on them being for the plaintiff, we must have obtained the certificate of the Judge at the trial that we had probable cause for pleading them. But there was no evidence given on those pleas, and consequently no certificate could be obtained.

1834.

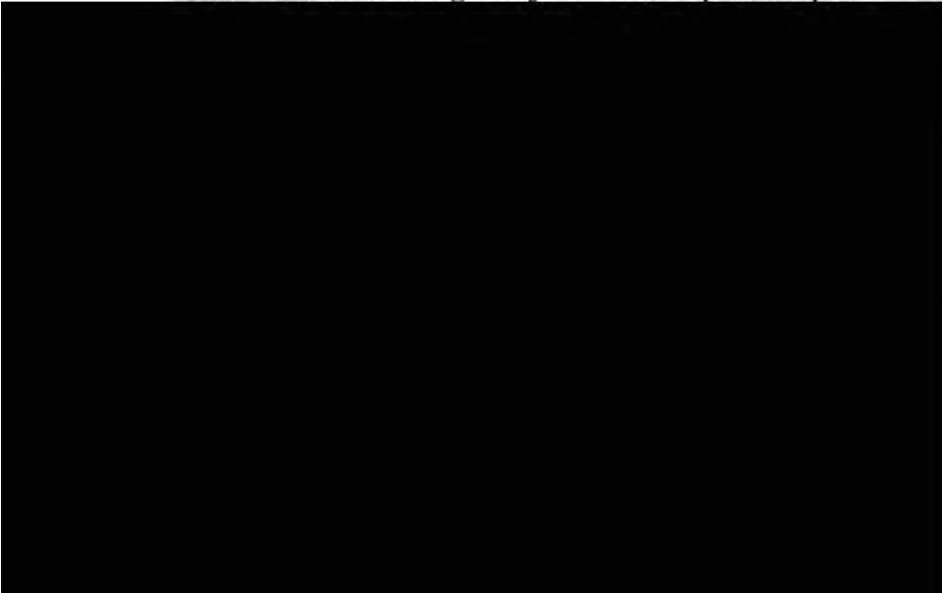
HART
v.
CUTBUSH.

1834.

HART
v.
CUTBUSH.

PARKE, J.—You might have insisted on going on to try the pleas of justification, for you were entitled to have them tried. The plaintiff would be entitled to the costs of the issues found for him, he being entitled to sign judgment upon them. It is one of the conditions on which a party is allowed to plead double, that the costs of the special pleas shall be in the discretion of the Court, or Judge at *Nisi Prius*. It is perfectly fair that the plaintiff should have the costs of those issues which are found for him. The defendant puts the plaintiff to expense by his pleas of justification, and, therefore, he ought to indemnify the plaintiff for all the costs which he incurs both of witnesses and pleadings. The Master, of course, proceeds according to the *postea*, and taxes the plaintiff his costs on the issues found for him; and the practice of late years has been to tax him not only the costs of the pleadings, but of the witnesses.

Follett cited *Vivian v. Blake and Others (a)*, which was an action of trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A.* and *B.* The first plea was not guilty, and the second that the said free fisheries were parcel of a navigable harbour, &c., common to all the King's subjects. The replication pre-



git, the defendant pleaded, first, not guilty; secondly, a right of common; thirdly, a right of way. The plaintiff took issue on the plea of not guilty, and traversed the rights of common and of way; and new assigned to the second and third pleas, that the defendant on other occasions, and for other purposes than those mentioned in the special pleas, committed the trespasses complained of. Defendant in his rejoinder took issue upon the traverse of the right of common, and right of way; and withdrew the plea of not guilty, so far as it related to the trespasses newly assigned, and suffered judgment by default to the new assignment. At the trial, the issue on one of the special pleas was found for the defendant, and the jury assessed the plaintiff's damages on the new assignment at 5*l*.: Held, that the defendant was entitled to the costs of the trial.

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HART
v.
CUTBUSH.

PARKE, J.—I am aware of those cases, and I know the matter was very much considered by the Court in the case of the Duke of *Newcastle v. Green* (a). There the defendant put no less than thirty-five special pleas on the record, besides the general issue. The general issue was found for the defendant, and the Duke had a verdict on all the special pleas. There it was held that the Duke was entitled to the costs of the pleadings, and of the witnesses in support of them. His costs exceeded those of the defendant. As to the costs of the pleading and the costs of the witnesses being distinguished, there can be no reason for so doing. If the plaintiff is entitled to the costs of the pleadings, why should he not be entitled to the costs of the witnesses in support of them? The necessity of bringing them is caused by the manner in which the defendant pleads.

Follett cited *Other v. Calvert* (b), in which it was de-

(a) Not reported.

(b) 8 J. B. Moore, 239; 1 Bing. 275.

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cided, that where costs in the cause are adjudged to the defendant, and to the plaintiff costs on the issues found for him, the costs of the issues, except in replevin, include only the costs of pleadings.

PARKE, J.—I know it was so decided in that case; but I have considered the matter very much, and I think that the plaintiff having been put to expense by the variety of pleas, it is only fair that he should be re-imbursed all the expenses to which he has been put. That was the principle acted on in the case of the Duke of *Newcastle*. You will therefore take no rule.

Rule refused.

FISH v. PALMER.

If a plaintiff proceeds by writ of summons, he cannot declare against the defendant until eight days after the service, inclusive of the day of serving

M*MARTIN* shewed cause against a rule *nisi* for setting aside a declaration, and the notice thereof, on the ground of irregularity. He took a preliminary objection, that the application to set aside these proceedings was too late. If it was any irregularity, it had occurred on the 7th of *November*, and the application on the ground of it was not made until the 25th of that month.

by the defendant that the plaintiff had no right to those costs: he was, however, clearly entitled to them, as, although the defendant was not obliged to appear before the 8th day, the plaintiff had a right to declare *de bene esse*, according to the directions of the rule 10 *Reg. Gen. T. T. 1 Will. 4*. By that rule it was provided, "That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest." Here, the plaintiff not having declared until the seventh day, was quite regular.

Cottingham, in support of the rule, contended, that the plaintiff had no right to declare *de bene esse* on serviceable process, since the passing of the Uniformity of Process Act. On referring to the form of the summons, it was clear that the plaintiff had no right to declare before the ninth day. He having declared before that day, he was not entitled to the costs of his declaration. The summons required the defendant within eight days after the service of the writ, inclusive of the day of such service, to appear in the cause. The plaintiff, therefore, had no right to proceed until after the eighth day. He would, therefore, have no right to declare until the ninth, as the summons was served on the first. As he had thought proper to declare on the seventh, he was not entitled to the costs of the declaration.

PARKE, J. (having referred to Master *Goodrich*).—He certainly had no right to declare before the expiration of the eight days; and, therefore, he is not entitled to the costs of the declaration.

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v.
PALMER.

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Martin then suggested, that it appeared, from his affidavit, that more costs than those paid by the defendant were due to the plaintiff.

On this suggestion, it was referred to the Master to ascertain what further costs, if any, were due to the plaintiff.

BECK v. YOUNG.

An affidavit of debt, sworn before the signer of the bills of *Middlesex*, before the 2 *Will.* 4, c. 39, was in force, will not authorize the issue of a writ of *capias* since that act came into operation.

ARCHBOLD shewed cause against a rule for discharging the defendant out of the custody of the Marshal for irregularity, on entering a common appearance. The affidavit, on which the application was made, stated that the defendant was arrested on the 22nd of *November*, on a writ of *capias*, for the sum of 25*l.* 13*s.* 8*d.*, and had remained in prison ever since. The objection to the arrest was, that the affidavit of debt was sworn before the signer of the bills of *Middlesex*, before the 2 *Will.* 4, c. 39, came into operation; and the *capias* issued, on the affidavit so taken, after it was in force. He cited *Rodwell v. Chapman (a)*, in which it was held, that if a writ of *capias* be issued into one county on an affidavit of debt,

of debt should be made. The present rule must, therefore, be discharged.

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Chandless, in support of the rule, referred to the words of the 12 Geo. 1, c. 29, s. 2, which provides that the affidavit of debt shall be sworn before certain persons there mentioned, or "before the officer who issues the process, or his deputy." The signer of the bills of *Middlesex* had not, before or since the new Process Act, any authority to issue a *capias*, and therefore was not, at the time the affidavit was made, an officer to issue such process; consequently, an affidavit sworn before him could not support the writ. He cited *Dalton v. Barnes* (a), wherein it was held that a special *capias* issued on an affidavit sworn at the Bill of *Middlesex* Office was irregular; and *Anderson v. Hayman* (b), where, on an affidavit sworn before and filed with the filacer for *Devon*, a *capias ad respondendum* issued to the sheriff of that county against the defendant, who, not being found there, an office copy of the affidavit was filed with the filacer for *London*, on which another *capias* issued, directed to the sheriff of *London*, under which the defendant was arrested; the Court there held that this was irregular, as an affidavit should have been sworn before the filacer in *London*. On the authority of these cases he submitted that the present rule must be made absolute.

Cur. adv. vult.

PARKE, J.—The affidavit made before the signer of the bills of *Middlesex*, who had not power to issue a *capias*, cannot be made the ground of suing out such a writ. The present rule must, therefore, be made absolute for setting aside the arrest.

Rule absolute.

(a) 1 M. & Sel. 230.

(b) 2 J. B. Moore, 192.

1834.

FARNCOMBE v. KENT.

If a defendant dies in execution, a *fi. fa.* tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, will support a *testatum* issued under the 21 *Jac.* 1, c. 24, s. 2, into a foreign county.

CHANDLESS shewed cause against a rule *nisi* for setting aside a *fi. fa.*, and a *testatum fi. fa.* founded thereon, issued into the county of *Surrey*, against the goods of the defendant.

It appeared, from the affidavits, that the defendant had been charged in execution in *Hilary* Term, 1833, and had died in execution on the 31st of *July* in that year. After his death, a writ of *fi. fa.*, under the 21 *Jac.* 1, c. 24, s. 2, was issued into the county of *Middlesex*, in which the venue was laid, tested on the first day of the previous *Trinity* Term, and made returnable on the last day of the same term. This writ was returned *nulla bona* by the plaintiff's attorney. A *testatum fi. fa.* was then issued, tested on the last day of *Trinity* Term, and returnable on the first day of *Michaelmas* Term, and directed to the sheriff of *Surrey*. Under this writ the sheriff seized certain goods belonging to the defendant's estate. The present rule was then obtained to set aside the writ of *fi. fa.* and *testatum fi. fa.* The objections to the writ of *fi. fa.* were, *first*, that it was tested and returnable during a period when the defendant was in execution, and, *secondly*, that it was returned by the plaintiff's attorney instead of

tiff took out a *fi. fa.*, returnable the same last day, to warrant a *testatum*. And, *per Curiam*, it was well; for, though the defendant has four days after the return of the second *sci. fa.* to plead, yet that is a favour to him; when he does not plead, the judgment is of the day of the return of the second *sci. fa.*; and he may very well take out a *fi. fa.* after, to warrant the *testatum*." In that case also, "the secondary remembered a case where a *fi. fa.* was returnable before the judgment affirmed, and held good in favour of execution to warrant a *testatum*." By analogy to this case, it is clear that the plaintiff might at any time sue out a *fi. fa.* in order to warrant the *testatum*. As to the second objection, that the *fi. fa.* was returned by the attorney instead of the sheriff, it was decided, in *Palmet v. Price* (a), that process whereon to ground a *testatum* is returned by the attorney of course. Next, with respect to the objection to the *testatum fi. fa.* The Court has power to issue an original *fi. fa.* into any county foreign to that in which the venue is laid. This is clear from a case in *Dyer*, 162 (b), where it was held, that, if the defendant has lands in several counties, the plaintiff may have several *elegits* for the whole debt into each county, and which was adjudged upon a case cited from the Year Books as to a *fi. fa.*

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PARKE, J.—There is no doubt upon that point.

Chandless.—If then the Court has power to issue an original *fi. fa.* into a foreign county, the *testatum*, which must be founded on a previous *fi. fa.*, can only be void on the ground of variance from the record on which it purported to be issued. Here, however, there would be no variance, because, on the roll it would appear that there was a *fi. fa.*, although that might be an invalid one. He cited *Goodyere v. Ince* (b). In that case, error was

(a) 2 Salk. 589.

(b) Cro. Jac. 246.

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brought in the *Exchequer*, “ for that whereas the defendant recovered in the *Common Pleas* damages in a debt of 100*l.*; the plaintiff thereupon had an *elegit* into the county of *Lancaster*, which mentioned that another *elegit* issued before into *London*, and was returned *nihil*; and, upon a *testatum est*, it was commanded to extend all the goods and land, &c., and thereupon the sheriff returned that he took a lease for years of tithe, which he delivered to the plaintiff as *bona et catalla sua*, for the said debt. The error assigned was, that this writ was with a *testatum*; whereas there was not any writ before awarded into *London*.” There, the Court held, that, as there was not any writ before awarded, it was error, on the ground that the *elegit* stated such former writ, not on the ground that an *elegit* could not, without such former writ, have been issued into the county of *Lancaster*. But, in the present case, a previous writ was awarded, issued, and returned. So, in the last-cited case, the want of a previously issued writ was the only objection; and, as in the present no such defect existed, the present proceeding must be taken to be regular. The rule must therefore be discharged.

R. V. Richards, and *Mansel*, in support of the rule.—



lifetime of the defendant, and while he was in execution, and is therefore void, it cannot support a *testatum*.

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PARKE, J.—In ordinary cases, the *fi. fa.* may be issued at any time in order to warrant the *testatum*. The only question is, whether, this *fi. fa.* being void, it will warrant the *testatum*. As to the *fi. fa.* having been returned by the attorney, that is of no consequence, as it appears to be the practice now for attorneys to return it, instead of its being returned by the sheriff (a).

Cur. adv. vult.

PARKE, J.—It appears, that, in this case, the defendant died on the 31st *July*, 1833, in execution, at the suit of the plaintiff, on a judgment signed during the lifetime of the deceased. The plaintiff had, consequently, a right to proceed under 21 *Jac.* 1, c. 24, s. 2, against the lands and goods of the deceased. He accordingly sued out a *testatum fi. fa.*, tested in the lifetime of the testator, directed to the sheriff of *Surrey*. The objections to this proceeding were, that the *fi. fa.*, on which the *testatum* was founded, was tested on the first day of *Trinity* Term, and returnable on the last day, and that, as during that time the defendant was in execution on the *ca. sa.*, it was irregular. There is no case which is exactly an answer to the objection. In the case, however, of *Austin v. Crisby* (b), the secondary mentioned to the Court that it had been held, that a *fi. fa.* issued before judgment affirmed might be tested and returnable pending a writ of error, to support a *testatum* issued after such affirmation. Now it seems to me, by analogy to that case, that the present *fi. fa.* may be sufficient to support the *testatum*, although, if issued during the lifetime of the defendant, it could not

(a) It should seem, however, to an action at the suit of the that by making the return instead latter.
of the sheriff, he would be liable (b) 7 Mod. 138.

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have been supported. There was another objection in the case, that the *fi. fa.* was irregular, because it had been returned by the attorney of the plaintiff instead of the sheriff. But it appears from the affidavits that an application was made to the sheriff to return this writ, but, as he had been requested not to do so, he refused. In consequence of this refusal, the plaintiff had a right to get it returned by his own attorney. There is an express authority to that effect in *Palmet v. Price* (a). Upon the whole, therefore, it appears to me, that this rule ought to be discharged; but, as it is a point of some novelty, it may be discharged without costs.

Rule discharged without costs.

(a) 2 Salk. 589.

DOE d. LINDSEY v. EDWARDS and Others.

A rule requiring a pauper to pay the costs of the day, for not proceeding to

AUSTIN moved for the costs of the day for not proceeding to trial. The lessor of the plaintiff was a pauper, and had given notice of trial for the last assizes, but had

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JACKSON v. CHARD.

HEATON, on shewing cause against a rule, took a preliminary objection, that the affidavit of the defendant, on which the rule was obtained, contained no addition of the deponent, according to the direction of 1 *Reg. Gen. H. T. 2 Will. 4*, s. 5 (a), the words of which are, "the addition of every person making an affidavit shall be inserted therein."

Where a defendant makes an affidavit in a cause, his addition need not be given.

PARKE, J.—Before the promulgation of that rule, a similar one existed in this Court; but no such rule prevailed in the *Common Pleas*. The rules of *Hilary Term, 2 Will. 4*, were formed to assimilate the practice of the Courts. As far as this Court is concerned, there was nothing new in that rule; and, therefore, the same construction of it which previously prevailed will prevail now. Where the defendant in the cause made an affidavit, that rule was held not to apply. A decision to the same effect was pronounced by the *Exchequer* in one case, since the rule of *Hilary Term* came into force (b). The affidavit now objected to is therefore sufficient.

(a) *Ante*, Vol. 1, p. 184.

(b) *Poole v. Pembrey*, *ante*, Vol. 1, p. 693.

 REX v. POLFIELD.

C. CRESSWELL moved to quash a coroner's inquisition, on the ground that it stated it to have been taken "on the oath of eleven men, and the affirmation of one man," without going on to state that the one man, on whose affirmation the inquisition had been taken, was one of the people called *Quakers* or *Moravians*. The new act, the 3 & 4 *Will. 4*, c. 49, s. 1, which enabled *Quakers* and *Moravians* to act on juries on *their affirmation only*, being

If a coroner's inquisition states it to have been taken on the affirmation of a man, it should state that man to be either a *Quaker* or a *Moravian*.

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an innovation on the common law, it was necessary, when the inquisition stated that it was taken on the affirmation of one man, that it should appear that he was either a *Quaker* or *Moravian*, they being the only persons entitled to act on juries, without being sworn, their affirmation being sufficient.

PARKE, J.—Yes, it ought to appear on the face of the inquisition, that the person affirming was either a *Quaker* or *Moravian*. If it had, the inquisition would have been good.

Rule granted.

Ex parte GORDON.

Where an attorney seeks to be admitted, he does not sufficiently comply with the rule of *T. T. 33 Geo. 3*, by sticking up the notice of his intention to apply in the *King's Bench* Office, and outside the

V. LEE applied to admit an attorney. All the steps previous to the application had been regularly taken, except that notice of his intention to apply for admission had not been stuck up in the *King's Bench* Office, and outside of the Court, until the first day of the term in which he applied for admission, but before the sitting of the Court. He submitted that that was a sufficient compliance with the rule of *T. T. 33 Geo. 3*, which requires

the notice in the case of re-admissions is, that the party will apply on the last day of the term for admission. I will, however, consult the other Judges.

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Cur. adv. vult.

PARKE, J.—I have consulted the other Judges, and we think we should be departing from the established rule if we allowed this person to be admitted on this notice. He cannot therefore be admitted.

Admission refused.

DOE *d.* LINDSEY *v.* EDWARDS and Others.

KELLY shewed cause against a rule obtained by *Austin*, requiring the lessor of the plaintiff to pay the costs of the day for not proceeding to trial. The lessor of the plaintiff sued *in formâ pauperis*, and, on the evening before the day of trial, it was considered advisable, in consultation, not to proceed to trial without a particular document, with which, the lessor was not prepared. He did not accordingly proceed to trial; and the present application was made under 1 *Reg. Gen. H. T. 2 Will. 4*, s. 110, to compel the pauper to pay costs, which the Court had power to do in its discretion, though the party had not been dispaupered. He submitted, however, that the reason for not proceeding to trial, which had now been given, was sufficient to excuse the pauper from paying costs.

If a pauper withdraws his record because he is not prepared with a certain necessary document at the assizes, the Court will compel him to pay the costs of the day.

PARKE, J.—The pauper ought to have been prepared to try at the assizes for which he had given notice. He has the advantage of counsel and attorney for nothing, and no fees to pay. It is exceedingly hard on the other side to be compelled to appear at the assizes, in pursuance of a notice of trial from the pauper, and then, when the time arrives, the record is withdrawn. I think suffi-

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cient excuse has not been given by the pauper for not proceeding to trial; and therefore he ought to pay the costs of the day.

Rule absolute.

BROCHER v. POND.

A *fi. fa.* on a judgment signed after a defendant's death, in vacation, may be tested on the last day of the preceding term, notwithstanding the 3 & 4 Will. 4, c. 67, s. 2.

THIS was a rule obtained by the sheriff, under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act), requiring an execution creditor, and a claimant on the property seized under the *fi. fa.*, to appear before the Court to state their respective claims, and abide the order of the Court. The defendant died in *Michaelmas* vacation, and judgment was immediately signed on a warrant of attorney, given by the defendant. The *fi. fa.* was tested on the last day of *Michaelmas* Term. Under this *fi. fa.* the sheriff made a levy on the goods of the defendant.

Barstow appeared for the sheriff.

Turner appeared for the claimant; and contended, that the execution creditor had no right to issue a *fi. fa.* after the death of the defendant, tested in his lifetime, as the 3 & 4 Will. 4, c. 67, s. 2, requires all writs of execution to

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SIMPSON v. DRUMMOND.

DOWLING shewed cause against a rule obtained by *Platt* for a new trial. He objected to the mode in which the affidavit on which the motion had been made described the deponent. The deponent there described himself as "late clerk to" &c. This, he submitted, was not a sufficient compliance with the directions of 1 *Reg. Gen. H. T. 2 Will. 4, s. 5*, which requires, that "the addition of every person making an affidavit shall be inserted therein." The rule must mean an addition which described the deponent as what he now was, and not what he had been. The description here was merely what he had been, and, therefore, was not within the meaning of the rule.

A deponent complies sufficiently with 1 *Reg. Gen. H. T. 2 Will. 4, s. 5*, by describing himself as "late clerk to" &c.

PARKE, J.—I think the description here is sufficient.

Dowling then proceeded to shew cause on the merits; and the matter was ultimately referred to a gentleman at the bar.

Rule accordingly.

The Inhabitants of **PATTRINGTON**, Appellants, and the Inhabitants of **COTTINGHAM**, Respondents.

THE pauper, who was a single woman pregnant with a bastard child, was removed from *Cottingham* to *Pattrington* under the following order:—

An order of justices under the 35 *Geo. 3, c. 101*, sufficiently states the chargeability of a woman, by stating her to be "a widow now pregnant."

"*East Riding of Yorkshire*.—To the churchwardens and overseers of the poor of the parish of *Cottingham*, in the said riding, and the churchwardens and overseers of

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the poor of the parish of *Pattrington*, in the said riding. Upon the complaint of the churchwardens and overseers of the poor of the parish of *Cottingham* aforesaid, unto us, whose names are subscribed, two of his majesty's justices of the peace for the said riding, that *Sarah Marr*, widow of *Hugh Marr*, now pregnant, came lately to inhabit the said parish of *Cottingham*, not having gained a legal settlement therein, nor produced a certificate owning her to be settled elsewhere; and that the said *Sarah Marr* became chargeable to the said parish of *Cottingham*:—We the said justices, upon due proof made thereof, as well upon the examination of *Sarah Marr* upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true, and we do likewise adjudge that the legal settlement of the said *Sarah Marr* is in the parish of *Pattrington*, in the said riding: These are, therefore, in his majesty's name to require you, the churchwardens and overseers of the poor of the parish of *Cottingham* aforesaid, to convey the said *Sarah Marr* from your parish of *Cottingham* aforesaid, and her to deliver to the said churchwardens and overseers of the poor of the parish of *Pattrington* aforesaid, together with this precept, or a true copy thereof, at the same time shewing to them the original. And we do also hereby require

were not able to do, and the sessions, being of opinion with the appellants' counsel, quashed the order for informality, and refused the respondents a case. The respondents having obtained a rule to shew cause why the order of removal and the order of sessions should not be removed by *certiorari* into this Court—

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R. Hildyard shewed cause.—The order of sessions was right. There are but two heads of chargeability: pregnancy with an illegitimate child, and the receipt of parish relief. If the head of chargeability, on which the pauper is removed, appears on the face of the order, it is not competent for the respondents on the trial of the appeal to have recourse to a different chargeability. It will hardly be contended by the other side, that, if an order stated a pauper to have become chargeable by reason of pregnancy, in failure of proof to that effect, the order could be supported by shewing chargeability by receipt of parish relief, or *vice versa*. Then does this order on the face of it negative chargeability by pregnancy with a bastard child? That is the question. It might have stated the pauper's chargeability generally. That, it must be admitted, after the decision in *Rex v. Inhabitants of Tibbenham* (a), would have been sufficient. Or it might have stated her to be a single woman pregnant, and then the law might have presumed the illegitimacy. Or it might have stated her to be a widow pregnant, who, by reason of her pregnancy, had become chargeable. But, instead of adopting any of these descriptions, the order states that the pauper is a widow, and pregnant, without proceeding to state that the child was likely to be born a bastard, or that it was by reason of her pregnancy that she had become chargeable. What then is the presumption of law in the absence of these latter statements? There is a

(a) 9 East, 388

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double presumption against the woman's pregnancy with an illegitimate child. Being described as a widow, the child, for any thing that appears on the order, may be the child of her deceased husband, and the law presuming in favour of chastity will suppose it to be so. *Secondly*, the law, seeing that the child may have been begotten in wedlock, will presume in favour of its legitimacy. *Rex v. Wyke (a)* is a strong authority to this effect. There, a woman pregnant with a bastard came into a parish by certificate. The certificate undertook that the certifying parish should provide for her and her child whenever they should become chargeable. The Court held that the word "child" must be taken to mean a legitimate child then in being, and not the bastard with which the pauper was pregnant. Again, an order is a judgment, and must be certain and positive. See *Rex v. St. Mary Ottery (b)*. Here, on the contrary, it is easy to conceive how this order may be used to give a derivative settlement to the child, whose illegitimacy is the foundation of the removal. Suppose the mother hereafter acquires a settlement in her own right. This settlement she cannot communicate to the child, because it is a bastard. But suppose the mother to die, and evidence of the child's illegitimacy not to be forthcoming, the child may be removed as a legitimate child to the settle-

be born a bastard, or that by reason of her pregnancy she has become chargeable; thereby precluding the presumption which it is contended is raised by the description adopted in the present order.

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C. Cresswell, contra, submitted, that it must be presumed from the language of the order that the child was a bastard.

PATTESON, J.—I think, upon the whole, the pauper must be taken to be chargeable on the statement in the order. The present rule must be made absolute for the *certiorari*.

Rule absolute (a).

(a) This case was decided last *Michaelmas* Term, but was unavoidably omitted in its proper place.

BRAZIER v. BRYANT.

THIS was an application on the part of the plaintiff to tax the bills of his attornies, Messrs. *Clutton, Carter, & Fearon*, and to ascertain what sums should be allowed, and in what manner to reduce the amount secured by certain warrants of attorney given by *Brasier* to the above attornies. It appeared that three bills of costs had been delivered by Messrs. *Clutton & Co.* in 1829 to Mr. *Brasier*; and, to secure the payment of two of them, two warrants of attorney were given in the year 1830. On these warrants judgment was entered up, and execution issued on the 10th of *May*, 1833. The payment of the third bill was not secured; but a sum of 75*l.* was paid by *Brasier* generally, on account of debt and costs due to Messrs. *Clutton & Co.* Under these circumstances, Mr. *Bryant* came to the Court; and a rule in the following

If a debtor pays money to his creditor, without directions as to its appropriation, the creditor has a right to apply it in liquidation either of a judgment or simple contract debt.

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terms was pronounced by the Court, on the 12th of *June*, 1833:—"That it be referred to the Master 'to tax the bills of costs of Messrs. *Carter, Clutton, & Fearon*, delivered to *Samuel Brazier*; and to take the *cash account* between the said *Samuel Brazier* and the said Messrs. *Carter, Clutton, & Fearon*, or any or either of them, and to inquire whether the judgments obtained by the said Messrs. *Carter, Clutton, & Fearon* against the said *Samuel Brazier* should stand or not. And to report thereon to a *Judge at Chambers*. All proceedings on certain executions against the goods of the said *Samuel Brazier* being in the meantime stayed."

The case came before Master *Goodrich*, and, after a long inquiry, the following report was made by that gentleman to *Tindal, C. J.*, at chambers:—

"I humbly certify, that, in obedience to the above rule, I have taxed two several bills of costs, *delivered* to the said *Samuel Brazier*, one for business done by the firm of *Clutton & Carter*, the other for business done by the firm of *Clutton, Carter, & Fearon*. And I have also taken the cash accounts between *all* the parties aforesaid, in respect of such bills. And I find that on the 10th of

payment of such last-mentioned bill and cash account, the sum of 134*l.* 9*s.* 10*d.* And for which sum I am of opinion, that the judgment so entered up, and execution issued thereon, should stand.

“ And I further certify, that, in obedience to an order made by the Right Honourable Lord *Lyndhurst*, bearing date the 7th day of *August* last, I have also taxed a third bill of costs, amounting originally to the sum of 98*l.* 7*s.* 2*d.*, (but which I have reduced to the sum of 66*l.* 1*s.* 10*d.*), being so much of the costs of an action as had been incurred by the said *Samuel Brazier* up to the 29th of *September*, 1827, when the partnership between *Clutton & Carter* and Mr. *Fearon* commenced. And which bill I find was delivered to the said *Samuel Brazier* with the other two bills above referred to; but that the amount thereof was, by mistake, omitted to be inserted in the cash account furnished to the said *Samuel Brazier* when the warrants of attorney were executed. And I further certify, that the said *Samuel Brazier* has produced before me a receipt signed by a clerk of *Clutton & Co.*, and dated the 26th of *November*, 1832, (being two years after the date of the warrants of attorney), for the sum of 75*l.* ‘on account of debt and costs due to the late firms of *Clutton, Carter & Fearon*,’ which sum of 75*l.* I find was placed to the credit of the said *Samuel Brazier* in respect of the last-mentioned bill; the same originally amounting to 98*l.* 7*s.* 2*d.* as aforesaid; but which payment, by reason of such bill being now reduced to 66*l.* 1*s.* 10*d.* as before stated, will leave a balance of 8*l.* 18*s.* 2*d.* in favour of the said *Samuel Brazier*.”

“ On the part of *Brazier*, it is contended, that, inasmuch as the receipt in question was given for “ debt and costs,” the whole of the 75*l.* must be considered as a payment on account of the other two bills only, those being the only bills included in the warrants of attorney, and the costs consequently confined to them. On the other hand, it is

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insisted by *Clutton & Co.*, that the payment having been made on account of a *debt* due to the firms *generally*, they were at liberty to apply it as they pleased; the more especially as the bill in question was *delivered with the others*, and would have been included in the warrants of attorney had it been thought of at the time. And I am inclined to think they are right; but this is a point which I would humbly submit to your Lordship's superior judgment.

"Should your Lordship be of the *same* opinion, the balance of 8*l.* 18*s.* 2*d.* will go in reduction of the two judgments; but if of a *contrary* opinion, then the whole of the 75*l.* must be placed to the credit of the judgments, and *Clutton & Carter* in that case left to bring their action for the whole of the 66*l.* 1*s.* 10*d.*

"The only remaining point for your Lordship's consideration will, I apprehend, be the costs of the application and of the taxation, which costs I think *Brazier* should pay; *firstly*, because, in regard to the *merits*, he has been completely answered; *secondly*, because *less* than a sixth will have been taken off, whether the bill of 66*l.* 1*s.* 10*d.* be included in the computation or not; *thirdly*, because judgments have been obtained in respect of the two first

Master to state to the Court specially the facts and circumstances upon which he has reported as to the sums above mentioned, and as to the application of the sum of 87*l.* 5*s.*, also paid by *Braxier* to *Clutton* and *Carter*; and that, in the meantime, the sheriff retain the amounts levied under the executions issued on the judgments.

1834.
BRAZIER
v.
BRYANT.

On the last day of *Hilary* Term, *Platt* shewed cause against the rule, and *Petersdorff* supported it; when—

Lord DENMAN, C. J., with the concurrence of LITLEDALE, J., TAUNTON, J., and PATTESON, J., directed the rule to be discharged with costs, thus confirming the Master's reports.

Rule discharged with costs.

JAMES v. WILLIAMS.

ASSUMPSIT on a guarantie. Plea—the general issue. At the trial of this cause before the under-sheriff of *Middlesex*, the following instrument, signed by the defendant, was given in evidence:—

“Mr. *James*, as you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th *January*, 1833.”

It was objected, that this guarantie was void by the Statute of Frauds, as no consideration appeared on the face of it. The under-sheriff considered the objection fatal. A verdict was therefore found for the defendant, with leave to the plaintiff to move to set aside that verdict and enter a verdict for himself. In *Hilary* Term, *Barstow* obtained a rule *nisi* accordingly; against which—

A guarantie in these terms—
“As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date”—is void by the Statute of Frauds.

1834.

JAMES
v.
WILLIAMS.

R. V. Richards shewed cause, before *Patteson, J.*, in the Bail Court. This case cannot be distinguished from *Wain v. Warlters* (*a*); in which, where one person promised to pay the debt of a third person, without stating on what consideration, it was held, that parol evidence of the consideration was inadmissible by the Statute of Frauds; and, consequently, such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action. So, again, in *Cole v. Dyer* (*b*), where the guarantie was in this form:—" *R. R.*, plaintiff, and *J. A.*, defendant. We, the undersigned, jointly and severally undertake and agree to pay *G. C. C.*, gent., the debt and full costs in this action, provided, on or before the 1st day of *January*, 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him, the said *G. C. C.*, at his office, as the attorney for the plaintiffs. Dated this 6th day of *November*, 1830;" and containing in the margin the following letters and figures:—" Debt, 6*l.* 11*s.* 11*d.*; costs, 4*l.* 18*s.* 4*d.*.—11*l.* 10*s.* 3*d.*." The Court there held, that it did not shew a sufficient consideration to take it out of the Statute of Frauds. This latter case was still stronger than the former.

accordingly the present guarantie was given. The question is, whether a sufficient consideration appears on the face of it to take it out of the Statute of Frauds? In the case of *Wain and Another v. Warlters*, the question was, whether there was any consideration at all on the face of the guarantie, and, not what would make up such a consideration. And, therefore, the question was left open by that case as to what would constitute a sufficient apparent consideration on the face of the guarantie. The question, therefore, is, whether the Court can collect from the writing itself that the consideration was intended to be expressed. He referred to *Newbury v. Armstrong* (a). There the language of the guarantie was—"To Mr. *John Newbury*. Sir, I, the undersigned, do hereby agree to bind myself to be security to you for *John Corcoran*, late in the employ of *J. Pearson* of *London Wall*, for whatever you may intrust him with while in your employ, to the amount of 50*l.*, and, in case of any default, to make the same good. Dated 11th *March*, 1828; and signed, *W. Armstrong*." There, *Tindal*, C. J., said—"The Statute of Frauds requires that an agreement to answer for the default of another shall be in writing; and the word 'agreement' has been held to include a consideration, for, without one, there is no valid agreement. The question here is, whether a consideration appears on this agreement, or is to be collected from it by fair and necessary implication? In my opinion, the consideration appears. The language is, to be security to you for *J. Corcoran*, late in the employ of *J. Pearson*, for whatever you may intrust him with while in your employ. That is, if you will intrust one who has left the service of another. The words are all prospective. It may fairly be implied, that *Corcoran* had left one service, and that the guarantie was given in

1834.
 JAMES
 v.
 WILLIAMS.

(a) 6 Bing. 201; 3 M. & P. 509, S. C.

1834.

JAMES
v.
WILLIAMS.

consideration of his being taken into another. We ought not to be too strict in the construction of these instruments; for if every agreement entered into be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." Adopting the rule of construction supplied by this case, the consideration of the undertaking on the part of the defendant does sufficiently appear. What is the obvious meaning of the words, that, "if you will wait six weeks, I will pay you?" Although these very words are not used, that was clearly what the parties meant and understood by the language of the guarantie. He cited the case of *Coe and Another v. Duffield*, Clerk (*a*). There the language of the guarantie was—"Sir, I undertake to guaranty to you the payment of 100*l.*, now due to the estate of Mr. *William Goodwin*, currier, a bankrupt, from Mr. *Henry Wilson*, shoemaker, *King Street, Cambridge*, for articles which have been delivered to him for the use of his trade or business as a shoemaker; so that this my guarantie shall not be put in force against me for that sum for two whole years from the date thereof. Dated *April 3rd, 1820*." There the Court held, that, although there was no direct consideration expressed on the face of the guarantie, yet

—The defendant had a verdict, on the ground that the consideration for the promise did not appear on the face of the instrument. In the course of the argument the case of *Wain v. Warlters* was referred to, which was confirmed by *Saunders v. Wakefield* (a). It was contended, that here the consideration did appear on the face of the instrument. The rule of construction was not disputed, that you are bound to find the consideration in the instrument, not in express words, but you must collect it from the expressions in the instrument, not as matter of conjecture, but with certainty. *Wain v. Warlters* was precisely this case. The last case is *Cole v. Dyer* (b), which is the same in effect as this case. I cannot distinguish this from those two cases. The rule must therefore be discharged. There was a case of *Coe v. Duffield* cited in argument, and some reliance was placed on what Mr. Justice *Richardson* said there. Every thing laid down by that learned Judge is entitled to very great weight; but I think the meaning of Mr. Justice *Richardson* was mistaken. What he said related to the first letter written by the defendant to the plaintiff, and not to the guarantie.

Rule discharged.

(a) 4 B. & Ald. 595.

(b) 1 C. & J. 461.

1834.
JAMES
v.
WILLIAMS.

DIRECTIONS TO TAXING OFFICERS.

IN all actions of *assumpsit*, debt, or covenant, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds (without costs), the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed.

1834.

Provided, that, in case of trial before a Judge in one of the superior Courts or Judge of Assize, if the Judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a Sheriff or Judge of an inferior Court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of twenty pounds, or not, in the following form:


Debt above twenty pounds.

Debt twenty pounds, or under.

Three shillings and fourpence shall be allowed for drawing the judgment in all cases.

The officers of the Court of *Exchequer* are to allow no incipiturs of judgment upon paper, and are to mark the costs upon the *postea*.

Every brief sheet is to contain eight folios at the least, which are to be paid for at the rate of six shillings and eightpence per sheet for drawing, and three shillings and fourpence for copying; such parts of the brief only as are really drawn to be allowed as drawing, the rest to be allowed as copying.



	£	s.	d.	1834.
Senior counsel's clerk on consultation - -	0	7	6	}
The other counsel's clerk on ditto, each - -	0	2	6	
Attending as a witness at trials to prove documents - - - - -	0	10	6	

SCHEDULE I.

Commencement of Suit.

Letter before action, if sent - - - - -	0	2	0
Instructions to sue - - - - -	0	3	4
Writ - - - - -	0	10	0
Copy and service - - - - -	0	5	0
Bill and copy to indorse - - - - -	0	2	0
Searching for appearance - - - - -	0	3	4
Instructions for declaration - - - - -	0	3	4
Drawing same at 1s. per folio.			
Engrossing at 4d.			
Notice thereof, when filed - - - - -	0	5	0
Drawing particulars and copy - - - - -	0	2	6
Rule to plead - - - - -	0	1	0
Demanding plea - - - - -	0	3	0
Drawing issue, of whatever length - - - - -	0	3	4
Engrossing issue to deliver, at 4d. per folio.			
Notice of trial - - - - -	0	2	0

SCHEDULE II.

Where the Cause is tried before the Sheriff.

Summons for trial - - - - -	0	1	0
Copy and service - - - - -	0	3	0
Attending for order - - - - -	0	3	4
Paid for order - - - - -	0	1	0
Copy and service - - - - -	0	3	0

1834.

	£	s.	d.
Engrossing writ of trial, folio (14) - - -	0	4	8
Parchment - - - - -	0	3	0
Paid sealing - - - - -	0	0	7
Attending thereon - - - - -	0	3	4
Copy particulars to annex - - - - -	0	2	0
<i>Subpœna</i> - - - - -	0	5	0
Copy and service - - - - -	0	3	0
Making minutes of evidence for the hearing -	0	13	4
Attending to enter the cause - - - - -	0	3	4
*Paid in part of the Sheriff's fee on leaving the same - - - - -	0	4	0
Attending Court on trial - - - - -	0	13	4
Paid remainder of fee for trial - - - - -	1	4	6
Notice of taxing - - - - -	0	3	0
Affidavit of increase - - - - -	0	5	0
Paid filing affidavit - - - - -	0	1	0

(Whether Town or Country.)

Bill of costs and copies - - - - -	0	4	0
Attending taxing - - - - -	0	3	4
Paid taxing - - - - -	0	2	6

(In K. B. and Exchequer.)

Drawing judgment	0	3	4
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Where *fi. fa.*, and warrant thereon:—In town, 8*s.*In country, 13*s.*

1834.

SCHEDULE III.

Where Cause is tried at *Nisi Prius*, and Verdict for 20*l.*
or under.

	£	s.	d.
Engrossing record, folio (14) - - -	0	4	8
Parchment - - - - -	0	3	0
Paid sealing - - - - -	0	0	7
Attending thereon - - - - -	0	3	4
Copy particulars to annex - - - - -	0	2	0
<i>Venire</i> - - - - -	0	6	6
Paid return - - - - -	0	2	0
Attending thereon - - - - -	0	3	4
<i>Distringas</i> - - - - -	0	7	6
Paid return.			
Attending thereon - - - - -	0	3	4
<i>Subpœna</i> - - - - -	0	5	0
Copy and service - - - - -	0	3	0
Instructions for brief - - - - -	0	13	4
Brief and copy (no more). - - - - -	2	0	0
Attending to enter cause - - - - -	0	3	4
Paid entering (what has been paid).			
Paid counsel (as usual).			
Attending Court on trial - - - - -	1	1	0
Paid fees on trial (what has been paid).			
<i>Postea</i> - - - - -	0	5	0
Notice of taxing - - - - -	0	3	0
Affidavit of increase - - - - -	0	5	0
Paid filing same - - - - -	0	1	0
Bill of costs and copies - - - - -	0	4	0
Attending taxing - - - - -	0	3	4
Paid taxing (as usual).			

1834.								£	s.	d.
	Drawing judgment	-	-	-	-	-	-	0	3	4
	Entering on the roll, at 4 <i>d.</i>									
	Paid roll, at 10 <i>d.</i>									
	Paid judgment fee and docket.									
	Attending thereon	-	-	-	-	-	-	0	3	4
	Term fee	-	-	-	-	-	-	0	10	0
	Letters in Country Cause:—									
	Under 50 miles, 2 <i>s.</i>									
	Above 50 miles, 4 <i>s.</i>									
	Above 100 miles, 6 <i>s.</i>									



Easter Term.

IN THE FOURTH YEAR OF THE REIGN OF WILL. IV.



VORLEY v. GARRAD.

Where a plain-
tiff's attorney
receives a sum

WORDSWORTH applied for a rule to shew cause
why a new trial should not be granted, on the ground



for 6*l.* 5*s.*, the amount of the quarter's rent accruing due at the *Lady-day* when he quitted. He not paying the rent demanded, an attorney was employed to sue him. This attorney accordingly issued a writ, and the defendant then paid 10*l.* for the debt and costs. The receipt given was headed in the cause, and signed by the attorney, and was in these terms:—"Received, 10*l.*, debt and costs, in this action." The amount of the rent due was 6*l.* 5*s.*, and the costs 1*l.* 19*s.* 8*d.* The attorney had since died. The present action was brought for the quarter due from *Lady-day* to *Midsummer-day*. At the trial, it was contended, on the part of the defendant, that the sum of 10*l.* had been paid by the defendant to the plaintiff's attorney as a composition both for the quarter's rent due, and for that which would accrue due by the following quarter day. Unless it was to be taken so, the payment of the excess beyond the quarter's rent and costs at that time due could not be accounted for. On the part of the plaintiff, it was contended, that the excess was to be accounted for by the presumption, that other costs, besides the sum of 1*l.* 19*s.* 8*d.*, were owing, as the attorney had no authority to compromise the plaintiff's claim for a quarter's rent accruing due. If any payment had been made on such an understanding between the defendant and the attorney, it was unauthorized, and, therefore, did not bind the plaintiff. The jury found a verdict for the defendant. The present application was to obtain a new trial, on the ground that the verdict was against evidence—*first*, because the receipt was no evidence of the liquidation of the plaintiff's claims; and *secondly*, that if it was, it was unauthorized by the plaintiff, and, therefore, no answer to the present claim.

TAUNTON, J.—The 10*l.* must have been paid for something beyond the amount of debt and costs in the action commenced by the attorney; and the jury have come to a conclusion which appears to me by no means an improper

1834.
 —————
 VORLEY
 v.
 GARRAD.

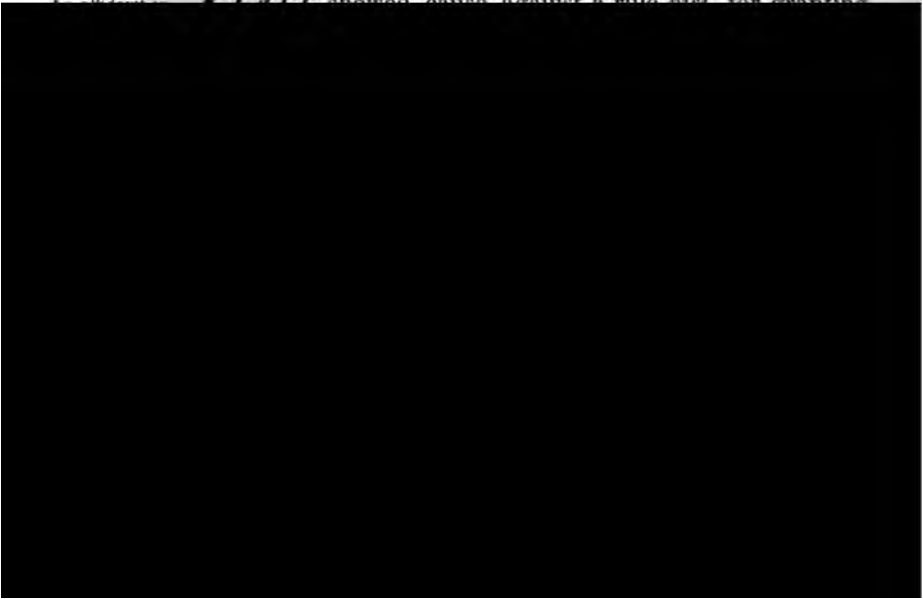
1834.
VORLEY
v.
GARRAD.

one, namely, that it was paid by the tenant in order to obtain his discharge from all liability in respect of the tenancy, and to induce the landlord to accept of a surrender from him of the tenancy. Then the question arises, whether the plaintiff's attorney had authority to enter into such a bargain? I think he had such a right in the common course of occurrences. If an attorney had not, no man would know how to transact business. It does not appear that the plaintiff made any attempt to disaffirm his authority, or even tendered to the defendant the surplus beyond the demand for debt and costs. If the sum of 10*l.* was paid in discharge of the plaintiff's whole claim, the present action was a wrongful one. I think, under all the circumstances, as it does not appear that the act of the plaintiff's attorney was repudiated by his employer, it must be taken to have been adopted by him. The present verdict, I think, therefore, was right, and ought not to be disturbed.

Rule refused.

UNWIN v. KING.

Plaintiff showed cause against a rule nisi for granting



was liable to be summoned to the County Court in *Middlesex*; and, *secondly*, that the demand of the plaintiff being cut down by means of a counter-claim, the fact of the sum for which the jury found their verdict being less than 40*s.* did not entitle the defendant to his double costs under the act. As to the first objection, it was only necessary to refer to the language of s. 19 of the act, to shew that it was indispensable that the defendant should shew himself liable to be summoned to the County Court. The words of it are, "That in case any action of debt, or action upon *assumpsit*, shall be commenced and prosecuted in any of his Majesty's Courts of Record at *Westminster*, and the defendant or defendants, at the time of such action brought, shall live and reside in the said county of *Middlesex*, and be liable to be summoned to the said County Court," &c. It was not sufficient for him to shew that he was residing in the county of *Middlesex*, because he might be resident there, and yet not liable to be summoned to the County Court, as he might be an attorney. The defendant, however, only described himself as residing "in *Brecknock Terrace, Camden Town*, in the county of *Middlesex*," which was clearly insufficient.

Gunning, contra, submitted, that it must be sufficiently clear, from the statement made in the affidavit, that the defendant was liable to be summoned to the County Court. If he was not liable to be summoned, it was for the other side to shew that he was not so liable.

TAUNTON, J.—I shall say nothing upon the second objection, as I have an opinion on the first, which removes the necessity of expressing any upon the second. The 23 *Geo. 2*, c. 33, s. 19, provides, "That in case any action of debt, or action upon *assumpsit*, shall be commenced and prosecuted in any of his Majesty's Courts of Record at *Westminster*, and the defendant or defendants,

1834.

UNWIN
v.
KING.

1834.

UNWIN
v.
KING.

at the time of such action brought, shall live and reside in the said county of *Middlesex*, and be liable to be summoned to the said County Court, &c., and the jury upon the trial of such cause shall find the damages for the plaintiff under the value of 40s., unless the Judge shall in open Court certify on the back of the record that the freehold or title to the plaintiff's land principally came in question, or that an act of bankruptcy principally came in question at such trial, then, and in such case, no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to and recover double costs of suit." It is, therefore, expressly enacted, that one of the terms, on which the defendant shall be entitled to double costs, shall be, that he is liable to be summoned to the County Court. But no such allegation is contained in the affidavit on which this application is founded. For any thing that appears, he may be exempt from being summoned, although he is resident within the jurisdiction. As this affidavit does not contain such an allegation, the defendant has not entitled himself to the benefit of this act, and the present rule must be discharged.

Rule discharged.

note to *Davies v. Hughes* (a), where judgment had been signed upon a *cognovit* without first filing a bill, which was holden to be irregular; but it having been done at the request of the defendant to save expense, the Court granted leave to file the bill *nunc pro tunc*, and directed the plaintiff to pay all the costs.

1834.
MORLEY
v.
HALL.

TAUNTON, J.—That was a case of an attorney defendant. There, no action was in existence against him until the bill was filed. Here, however, a writ had been issued, and, therefore, there was an action existing against the defendant. Besides, the Master (*Chapman*) informs me that it is the universal long established practice to sign judgment without filing or delivering a declaration.

White then proceeded to state the grounds on which the second objection depended; and on it *Taunton*, J., granted him a rule *nisi*.

Rule *nisi* granted.

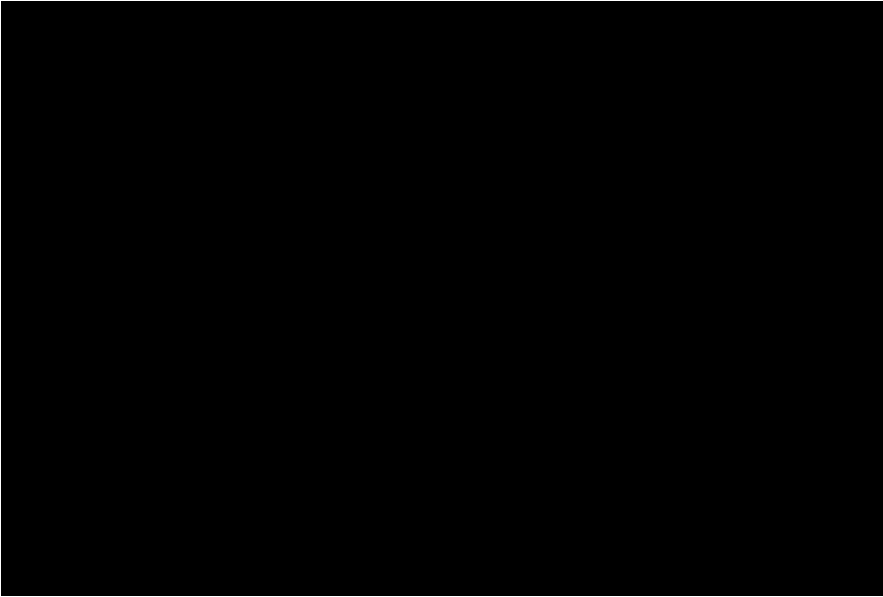
Platt afterwards shewed cause against this rule.—The facts stated in the affidavit, and which were admitted, were, that the defendant, being sued for a certain amount, agreed to give a *cognovit* for the debt and costs. It was accordingly given, and at the time the defendant paid a sum of 5*l.* on account, stating also, that he should be prepared to pay the whole amount in a fortnight. At his request the plaintiff's attorney gave him a memorandum in these words:—"The *cognovit* given by Mr. *Hall* this day in the action at the suit of Mr. *Morley* is not to be put in execution for a fortnight, Mr. *Hall* having paid 5*l.* on account." This memorandum was on a separate piece of paper. It was contended, however, on the other side, that with the *cognovit*, it formed an agreement, and there-

1834.

MORLEY
v.
HALL.

fore that there should be a stamp upon the *cognovit*. The memorandum, however, did not constitute with it an agreement. It was not a condition engrafted on the *cognovit*, but a mere independent promise on the part of the plaintiff that he would not put the *cognovit* in force for a fortnight. It might as well be said that the holder of a bill of exchange could not sue on it unless it had an agreement stamp, because a promise had been given to the defendant that it should not be put in force for a certain period. The present rule must, therefore, be discharged.

White, in support of the rule, contended, that, as the agreement between the parties was that the *cognovit* should not be put in force for a fortnight, that agreement ought to have been embodied in the *cognovit*, or it might have been written at the bottom of the instrument. It was given at the time of executing the *cognovit*, and therefore must be considered as part of an agreement made between the parties. He cited the case of *Reardon v. Swabey (a)*. There, on a motion to set aside proceedings for irregularity, one of the irregularities stated was, that the *cognovit*, on which the judgment had been signed and execution issued, was not stamped, which was contended on the



stamped. So here, the memorandum and the *cognovit* together formed an agreement which required a stamp. It ought, indeed, to have been filed, and the plaintiff, by not having done so, was guilty of a fraud on the defendant and the Court.

1834.
MORLEY
v.
HALL.

TAUNTON, J.—I am of opinion that the objection to this *cognovit*, on account of its not being stamped, ought not to prevail. The law upon the subject of stamps is altogether a matter *positivi juris*. It involves nothing of principle or of reason, but depends altogether on the language of the legislature. There is no stamp applicable to a *cognovit*, considered merely as a *cognovit*, it not being included in the schedule to the Stamp Act; but the Courts have said, that, if the *cognovit* contains any matter of agreement or stipulation, it shall be stamped, not as a *cognovit*, but as an agreement. Now this, which is said to constitute with the *cognovit* an agreement, is in truth nothing more than a memorandum given by the plaintiff's attorney, at the same time as the *cognovit* was executed on a separate piece of paper; and it is in these words, "The *cognovit* given by Mr. Hall this day, in the action at the suit of Mr. Morley, is not to be put in execution for a fortnight, Mr. Hall having paid 5*l.* on account." The memorandum is given by the plaintiff's attorney after the *cognovit* is executed, the defendant having paid 5*l.* on account. I do not see, therefore, that this *cognovit* is, in point of fact, or on inspection of the paper itself, any agreement between the parties, but a mere memorandum, altogether separate. I do not think it can be so connected with the *cognovit* as to make it bad for want of a stamp. It does not, therefore, come within that class of cases in which it has been decided that a *cognovit* with words of agreement requires a stamp. The present rule must, therefore, be discharged, but without costs, as some allowance must be made for a man struggling to obtain his liberty.

Rule discharged, without costs.

VOL. II.

L L

D. P. C.

1834.

WELSH v. LANGFORD.

In bailable process, it is not necessary to give a particular description of the defendant's place of residence. A place at which he may be expected to be found is sufficient.

BARSTOW moved for a rule to shew cause why the writ of *capias* in this case should not be set aside, and the defendant discharged out of custody, on the ground of a defect in the form of the writ. In stating the defendant and his supposed residence, it merely described him as "Captain *Langford*, of the Honourable *East India Company's* ship the *Kelly Castle*, and now most likely to be found at the *East India House*, in the city of *London*." This was by no means a sufficient description of residence according to the form contained in the schedule to the 2 & 3 *Will. 4*, c. 39. It neither gave the ship as his residence, or that which might be considered as the home of the ship. By such a description, the officer required to execute the process could not form any notion as to the place where the defendant could be found.

TAUNTON, J.—It appears to me that the description given in the writ in this case is a sufficient compliance with the form given in the schedule in the statute. It is to be observed, that there is a difference in the descrip-

county wherein he is supposed to be is required, for no other construction can be put on the words of this part of the writ. But as it does not appear from the form of the *capias* that any very particular description of the defendant's residence is necessary in that writ, but that it is enough if he is so described as to enable the officer executing the process to find the defendant, I think that the description here given is sufficient. It is clear that it was sufficient, for the sheriff has been able to arrest him. There may, perhaps, be good reason for not requiring the plaintiff to be so particular in his description of the defendant in bailable process as in serviceable process; for, where the former process is resorted to, it may not be always easy for the plaintiff to give a particular description of the defendant's residence. You will therefore take nothing by your motion.

1834.
WELSH
v.
LANGFORD.

Rule refused (a).

Foss, a Pauper, v. WAGNER.

HUMFREY had obtained a rule calling on the plaintiff to shew cause why he should not be dispaupered, or why he should not give security for costs, or why there should not be a stay of proceedings, until he should return to *England*.

Where a plaintiff, suing in *forma pauperis*, will be absent from *England* eighteen months, the Court will compel him to give security for costs, or stay his proceedings until his return.

Addison shewed cause.—It appeared by the affidavits on both sides that the action was commenced in *December* last; that the plaintiff was a seafaring man, and that in *February* he obtained a berth in a ship in the *China* trade as third officer; his wages were 3*l.* a month, and he sailed for *India* about that time, having signed the ship's articles to serve on the voyage out, and home again to *England*; that there was reason to believe he would re-

(a) See *Buffle v. Jackson*, *post*, p. 505.

1834.
FOSS
v.
WAGNER.

turn with the ship; that the ship would not return for eighteen months; that, according to the usage of the trade, plaintiff was paid a month's wages in advance at starting, and was supplied with slops and money to purchase mere necessaries during the voyage; but that the remainder of his wages was payable as the freight was earned; and that the first port of discharge was at *Calcutta*. On these facts, he contended, that, to make the plaintiff give security for costs was in effect to dispauper him; and that, if security for costs was to be enforced on this occasion, no seaman serving on a long voyage would be exempt from the rule. He cited the following cases: *Anonymous (a)*, *Anonymous (b)*, *Cole v. Beale (c)*, *Nelson v. Ogle (d)*, *Henschen v. Garves (e)*, *Jacobo v. Stevenson (f)*.



TAUNTON, J.—I think there are not sufficient grounds shewn to the Court to dispauper the plaintiff; but I think the other part of the rule, *viz.* that the plaintiff shall either give security for costs, or that there shall be a stay of proceedings until the plaintiff's return to *England*, ought to be made absolute. Where a party is out of the kingdom on a temporary absence, he is not to be called upon to give

1834.

ROBINSON v. DAY, Esq.

KELLY shewed cause against a rule *nisi*, obtained by **Ball**, requiring the defendant to shew cause why the sum paid into the hands of the sheriff by the plaintiff in error should not be paid out to the plaintiff below. It was an action of slander, and at the first trial the jury found a verdict for 100*l.* damages. A second trial was had, and the jury found a verdict for 150*l.* damages. On this verdict, judgment was signed, and execution issued. The defendant paid the money into the hands of the sheriff, and brought a writ of error. Bail in error was regularly put in. The notice of allowance of the writ was served upon the plaintiff below; and the question was whether this notice of the allowance was sufficient to operate as a *supersedeas* of execution? By 9 *Reg. Gen. H. T. 4 Will. 4.*, it is ordered, "That no writ of error shall be a *supersedeas* until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued; provided, that, if the error stated in such notice shall appear to be frivolous, the Court or a Judge upon summons may order execution to issue." Now, it was necessary to consider whether the notice of allowance in this case sufficiently complied with the rule. The notice was in these words, "Take notice that a writ of error has been allowed in the above cause; and that the particular grounds of error are, that the declaration and every count thereof is bad; the words as alleged not being actionable without special damage, which was negatived; and the innuendoes in every count are bad in law, and vitiate the record." This notice was clearly sufficient in stating the grounds of error. How could the objection which the plaintiff in error sought to raise, be more particularly stated? Or how could this be considered as frivolous error? If the objections which the plaintiff in error raised did go


A notice of the allowance of a writ of error in an action of slander, stating the grounds of error to be, that the declaration and every count thereof is bad, the words not being actionable without special damage, and the innuendoes bad in law, sufficiently complies with 9 *Reg. Gen. H. T. 4 Will. 4.*

1834.
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v.
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to every count in the declaration, and to all the innuendoes, it was impossible to state them in a more particular manner.

Platt and Ball, in support of the rule, contended that the notice of error here did not comply with the directions of 9 *Reg. Gen. H. T. 4 Will. 4*. Nothing could be more general than the mode in which the objections were here stated; and, therefore, it was impossible for the defendant in error to know what the points were on which the plaintiff in error proposed to rely. The object of the rule was, that the real objections should be particularly stated, in order that vexatious writs of error, or merely for the purpose of delay, might be discouraged. Here, however, it was impossible for the defendant in error to know what objections he had to meet. Under the terms of the rule, therefore, this notice could not operate as a *supersedeas*.

TAUNTON, J.—Nothing that I decide here will ultimately affect the rights of either party. The question is, whether the money, being in Court, and in safety and security, it shall, under the circumstances disclosed, be paid



of error, and does therefore operate as a *supersedeas*. The money, therefore, may remain in Court until the case is decided before the Court of error. The present rule must therefore be discharged; and, as it is a matter of doubt upon a new rule, it ought to be without costs.

1834.
ROBINSON
v.
DAY.

Rule discharged, without costs.

DOE d. KING v. ROBINSON.

WHITE shewed cause against a rule, requiring an attorney, named *Brown*, to deliver up an *allocatur* given by the Master on a certain taxation, to which *Brown* was a party. It appeared that *Brown* took out a summons to tax the bill of an attorney named *Woolley*. On taxation, the Master's *allocatur* was in favour of *Woolley*; and as soon as it was made *Brown* took it up, as he said, for the purpose of taking a copy of it, and he had since refused to give it up. The present application, therefore, was to compel him to deliver it to *Woolley*.

An *allocatur* is the property of the person in whose favour it is made.

TAUNTON, J.—The *allocatur* properly belongs to the party in whose favour it is made. *Brown*, therefore, by possessing himself of the *allocatur*, and refusing to give it up, was not justified. It might, perhaps, be convenient for him to have a copy of it; but that did not give him a right to keep possession of it. He must, therefore, deliver it up to Mr. *Woolley*, and must pay any expense which has been incurred in consequence of his retaining possession of the *allocatur*.

Rule absolute accordingly.

1834

GOODMAN v. LONDON.

Where a defendant is discharged from lawful custody, he is entitled to no privilege from arrest *redeundo*.

DUNBAR moved to discharge a defendant out of custody, on the ground of his having been arrested *redeundo* from his discharge out of criminal custody. The facts were these:—The defendant had been indicted by the plaintiff for embezzlement. He was tried and acquitted on the 5th *February*. An application was made to the Judge that night for his discharge; but, the grand jury being still sitting, he was not set at liberty till the next morning. He had not gone more than twelve yards from the prison, when he was arrested at the suit of the plaintiff for the same sum, the appropriation of which formed the subject of the indictment for embezzlement. His application, therefore, was, that the defendant should be discharged out of custody, on the ground of his being privileged from arrest, *redeundo* after being discharged from imprisonment. He cited *Wells v. Gurney* (a), where, by the contrivance of the plaintiff's attorney, a party had been arrested on a *Sunday* on a criminal process, for the purpose of effecting his arrest on a civil process, and he was detained in custody till *Monday*, and then arrested on the civil process; the Court there ordered him to be discharged out of cus-

1834.

CALVERT v. REDFEARN.

PLATT shewed cause against a rule *nisi*, obtained by *Chadwick Jones*, for setting aside an attachment for non-payment of costs, pursuant to the Master's *allocatur*. The ground on which the application was made was, that when the copy of the rule was served on the defendant for the payment of costs, the person serving it had refused to allow the defendant to see the original rule. In answer to the affidavit in support of the motion, it was sworn that the person serving the rule held the original in his hand, and offered to shew it him, so that he might read it, but would not allow the defendant to have it in his hand, because he knew the tricks of the defendant. This he contended was sufficient, without allowing it to go out of his possession.

In serving a rule for payment of costs, it is not necessary that the original rule should be placed in the hands of the defendant; if it is shewn to him, so that he can read its contents, it is sufficient.

TAUNTON, J.—It appears to me that an absolute delivery of the original rule was not necessary. If it was shewn to him in such a way that he could read it, that was sufficient. The present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

BUFFLE v. JACKSON.

MANSEL moved for a rule to shew cause why the defendant in this case should not be discharged out of custody, on the ground that the defendant's place of residence

In a writ of *capias* it is not necessary that the plaintiff should describe the exact resi-

dence of the defendant, but he may give the best description he can of the place where he is to be found.

A variance between the description of the defendant's residence in the affidavit of debt and the *capias* is immaterial.

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BUPPLE
v.
JACKSON.

was not stated in the writ of *capias* on which he had been arrested. The writ described the defendant as of "*Morpeth Place, Waterloo Road*, in the county of *Surrey*," and the affidavit described him as of "*Southampton Street, Pentonville*, in the county of *Middlesex*." He did not mean to contend that it was necessary the defendant's address should be stated in the affidavit of debt; but he used the fact of the variance in the description of the residence between the affidavit and the writ, in order to shew that the correct residence of the defendant had not been given in the writ. He cited the case of *Webb v. Lawrence (a)*.

TAUNTON, J.—The objection here is, that the description of the defendant's residence stated in the *capias* was not the true one; for, the affidavit of debt describes him as of one place and the *capias* as of another. It appears to me, however, that the description of the defendant's residence need not be particularly given, but the plaintiff may give such description of it as he can. There is a difference between the language of the section of the 2 & 3 Will. 4, c. 39, authorizing the issue of the writ of *capias* and the form given in the schedule, and the language in the section of that act authorizing the writ of summons

rected to the sheriff of *Surrey*, and the defendant is described in the affidavit of debt as resident in the county of *Middlesex*.

1834.
BUFFLE
v.
JACKSON.

TAUNTON, J.—That is of no importance, as the defendant might have been temporally resident in *Surrey*, although his permanent residence was in *Middlesex*.

Rule refused.

PALMER and Others v. FEISTEL and Another.

GODSON shewed cause against a rule for setting aside a judgment of *non pros*. It appeared that the action was brought against the defendants, as the drawers of a bill of exchange for 25*l*. One was arrested, and the other neither arrested nor served, as he was abroad. The defendant, who had been arrested, ruled the plaintiffs to declare, and demanded a declaration. The plaintiffs not declaring, the defendant, four days afterwards, signed the judgment of *non pros*. The question was, whether this judgment was regular? He contended that it was; for, if the plaintiff had chosen, he might have compelled an appearance, or proceeded to outlawry in the case of the defendant who had not appeared.

In an action against several defendants, a judgment of *non pros* cannot be signed until all have appeared.

TAUNTON, J.—It appears from the authorities in 1 *Tidd*, 459, that, where several defendants are sued, a *non pros* cannot be signed until all have appeared. The judgment of *non pros* in this case was, therefore, irregular, and must be set aside. The present rule will, therefore, be absolute.

Rule absolute.

1834.

CROWDER v. BELL.

Under the *London Court of Requests Act*, it is no objection to the defendant's claim for costs, that the plaintiff was unaware that the defendant resided within the jurisdiction.

EVANS shewed cause against a rule *nisi* for giving the defendant his double costs under the *London Court of Requests Act*, he having obtained a verdict, and the Judge at *Nisi Prius* having certified. The only answer which he had to the application was, that the plaintiff was unaware that the defendant resided within the jurisdiction of the act. There was no doubt that he did reside within the jurisdiction, for the affidavit in support of the rule shewed that he resided in *Little Knight Rider Street*, which was within the City of *London*.

TAUNTON, J.—The ignorance of the plaintiff is no objection to the defendant having his double costs. There are several cases to shew that this proposition is well founded. The present rule must, therefore, be made absolute.

Rule absolute.

WALLS v. REDMAYNE.

A defendant may obtain judgment as in

SWAN moved for a rule for judgment as in case of a nonsuit. The plaintiff's demand did not exceed 20*l.*,

for that of the superior Court. All proceedings preparatory to the trial are left in the same situation as they were before the passing of the statute. You may, therefore, take your rule.

1834.
WALLS
v.
REDMAYNE.

Rule granted.

DOBBINS v. GREEN.

THIS was a sheriff's rule, obtained under the 1 & 2 Will. 4, c. 58, s. 6, requiring the execution creditor, and a person claiming the goods seized under the *fi. fa.*, to appear before the Court, and state their respective claims, in order to abide such order as the Court should think proper to make.

The sheriff need not deny collusion, in order to obtain relief under the Interpleader act.

Shaw appeared on behalf of the claimant.—He contended that the sheriff was not entitled to relief under the act, as the affidavit on which the application had been founded did not deny collusion by him with either party. He cited the case of *Anderson v. Calloway (a)*. That was a similar application to the present, and the sheriff had paid over the proceeds of the levy to the execution creditor. Lord *Lyndhurst* there said, "The condition in the first clause is, that the party does not collude, and is ready to bring the money into Court." Mr. Baron *Bayley* also observed, "The powers and authorities to be exercised by the Court for the relief of the sheriff are in the sixth section expressly stated to be 'such powers and authorities as in that act are before contained,' which renders it necessary to refer to the preceding sections to ascertain the extent and application of those powers and authorities." This was an authority to shew that the first section and the sixth must be construed together, and, consequently, that, as an ordinary stakeholder must, before

(a) *Ante*, Vol. 1, p. 636, and 1 C. & M. 182.

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v.
GREEN.

he can obtain relief under the act, deny collusion, so must a sheriff or other officer executing process be subject to the same conditions. In the case of *Cook v. Robert Allen (a)*, which was also a case similar to the present, Mr. Baron *Bayley* observed, "It is not at all clear that the sheriff ought not to deny collusion." There, it was not necessary for the Court to decide whether the sheriff ought or ought not to deny collusion; but, from the language of Mr. Baron *Bayley*, it was quite clear that the Court would have required him to deny it, as a condition on which he should obtain relief.

Tomlinson, amicus Curia, stated that he had taken the same objection, in a similar case, before the full Court while Lord *Tenterden* presided; and his Lordship stated, that the first section of the act had been framed on the practice of bills of interpleader in equity, where it was always required by the Court in such cases that collusion should be denied. But, under the sixth section, which was intended for the relief of the sheriff, and others engaged in the execution of process, they being public officers, no such denial was necessary.

1834.


CHITTY, Gent., One &c., v. NAISH.

IN this case it appeared that the plaintiff, who has now become a bankrupt, was an attorney, and the defendant his client. Various business was done by the former for the latter, and various money transactions took place between them. The result was, that *Naish* became indebted to *Chitty* in a considerable amount. To secure the payment of a portion of this, three warrants of attorney were given, and judgments entered up. Certain sums of money were paid by *Naish* to *Chitty* on account, and a portion of it applied to satisfy the first and second judgments; with respect to the third, the difficulty arose as to the mode of applying certain sums in its satisfaction. A part had been realized under an execution; and for that part credit was given. An application was made on the part of *Naish*, that it should be referred to the Master to ascertain whether the three several judgments entered up by the plaintiff, before his bankruptcy, upon the warrants of attorney against the defendant, had been satisfied. It was accordingly so referred to Master *Goodrich*, with directions to certify as to the fact, in order that satisfaction might be immediately entered accordingly, and that the costs of the application should be in his discretion. The Master in his report found that two of the judgments had been satisfied entirely, and that the third had been satisfied, except as to the sum of 69*l.* 12*s.* 7*d.* The defendant objected to the Master's report as to the third warrant of attorney, for he contended, that, in point of law, the whole of the judgment had been satisfied. It appeared that the warrant of attorney, on which the remaining judgment was founded, was given to secure the sum of 309*l.* 7*s.* 2*d.*, being the balance of an account settled between the plaintiff and defendant up to the date thereof; as also the further sum of 104*l.* 0*s.* 10*d.*, the

If a debtor pays money generally to his creditor, without any directions as to its specific appropriation, the creditor may apply it in liquidation either of a judgment or simple contract debt. If the creditor, under such circumstances, make no specific application, the money shall be applied to one or other account according to the presumed intention of the parties, to be collected from all the facts.

1834.

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amount of two bills of exchange, given by the defendant to the plaintiff, and which were not then due, making together 413*l.* 8*s.* And the defeazance stated, that, in case default should be made in payment of such balance of 309*l.* 7*s.* 2*d.* on the day therein limited for that purpose, the plaintiff should be at liberty to levy the same immediately; and, if the bills should not be paid when due, he was to be at liberty to levy the amount thereof also at any time thereafter. The bills were not paid, but were renewed, and the renewed ones were dishonoured also, and afterwards paid by the plaintiff. Default was also made in payment of the balance of 309*l.* 7*s.* 2*d.* In consequence of this, the plaintiff issued an execution for the whole of the 413*l.* 8*s.*, of which sum the sheriff levied 343*l.* 15*s.* 5*d.*, leaving a balance due to the plaintiff of 69*l.* 12*s.* 7*d.* on his judgment.

There were other transactions of a pecuniary nature between the parties; and, by a general account current produced before the Master, it appeared, that the plaintiff, previously to their becoming due, had credited the defendant with the two bills of exchange, so included in the judgment in question, as also with monies received subsequently to the levy by the sheriff, exceeding in amount the 69*l.* 15*s.* 7*d.*, so remaining due on the judgment.

in regard to the bills of exchange, the judgment in question was, therefore, still subsisting as to the 69*l.* 12*s.* 7*d.* A rule to shew cause was, accordingly, obtained by *Erle* for the review of the Master's report.

1834.
CHITTY
v.
NAISH.

Barstow shewed cause against this rule; and contended, that, as no specific appropriation of the money paid by *Naish* to *Chitty* was directed by the former, *Chitty* had a right to apply the money so paid to the discharge either of a judgment or simple contract debt. The Master's report was in accordance with this principle, and therefore ought to be confirmed.

Erle, in support of the rule, contended, that, as the judgment was the more burdensome debt due from the defendant to *Chitty*, the latter should have applied the monies paid to him by the defendant in satisfaction of the judgment debt rather than the simple contract debt. He cited *Clayton's case* (a), and *Bodenham v. Purchas* (b).

Cur. adv. vult.

TAUNTON, J.—This was a rule calling on the plaintiff to shew cause why the Master should not review his decision in this case. It was referred to him to ascertain whether the three several judgments entered up by the plaintiff before his bankruptcy, on three warrants of attorney against the defendant, had been satisfied. If that were the fact, the Master was to certify accordingly, in order that satisfaction might be immediately entered upon the roll; and the costs of the application to be in his discretion. On this reference the Master inquired into the circumstances existing between the parties, and the facts appear to be these:—There were three several judgments, and he was

(a) *Merivale*, 572.

(b) 2 B. & Ald. 39.

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of opinion that two of them were satisfied. The last remaining one appeared to have been satisfied also, except as to the sum of 69*l.* 12*s.* 7*d.* The question is, whether he was right in his opinion as to that sum being still due on the judgment? It appears, that the warrant of attorney on which this remaining judgment is founded was given to secure the sum of 309*l.* 7*s.* 2*d.*, being the balance of an account settled between the plaintiff and the defendant up to the date of it, and also the sum of 104*l.* 0*s.* 10*d.*, being the amount of two bills of exchange given by the defendant to the plaintiff, which two sums formed together the total of 413*l.* 8*s.*; and in the defeazance of the warrant of attorney it was stated, that, in case of default being made in paying the sum of 309*l.* 7*s.* 2*d.*, the plaintiff should be at liberty to levy that sum immediately; and, if the bills were not paid when they became due, the plaintiff was to be at liberty to levy the amount thereof also at any time thereafter, so that this warrant of attorney was a specific security given for this compound sum of 413*l.* 8*s.*, with certain terms thereunto annexed. The bills were not paid by the defendant, but were twice dishonoured, and once renewed, and ultimately paid by the plaintiff. Default was also made in payment of the balance of 309*l.* 7*s.* 2*d.*, by which

that the plaintiff was bound, out of the monies received by him, to discharge the judgment, that being the most burdensome debt to the defendant. That is the whole of the argument on behalf of the defendant. However, the Master in his report says, that, as it did not appear that the defendant had ever required that any of these monies should be so applied, the plaintiff had a right to place them to the other account, the balance in favour of the plaintiff thereon being invariably greater than the sum of 69*l.* 12*s.* 7*d.* still due on the judgment. I have read over not only the Master's report, but also the general account current, and I am of opinion that the Master's view of the case was correct, and consequently that the 69*l.* 12*s.* 7*d.* must be considered as still due on the judgment; and in support of the view which the Master has taken, without going into the cases, the following may be cited, viz. *Hall v. Wood* (a), *Bosanquet v. Wray* (b), *Simpson v. Ingham* (c), *Goddard v. Cox* (d), and *Campbell v. Hodgson* (e). Other cases might also be cited to the same effect. These cases, however, completely confirm the Master's opinion on this subject. But *Clayton's case* and *Bodenham v. Purchas* were cited on the other side. In those cases, however, there were continuous accounts, in which debits and payments were introduced on different sides of the account; and therefore, there being no evidence of distinct appropriation, it was decided that the earliest payments should be applied to the earliest debits. That was all to those cases decided. The case of *Bodenham v. Purchas* was, however, much narrowed by the case of *Simpson v. Ingham*. Here, however, the warrant of attorney was taken as a specific security, containing special and particular terms. Therefore it is to be supposed, according to the argument of the defendant, that, when the plaintiff made out his account, he in-

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v.
NAISH.

(a) 14 East, 243, n.

(d) 2 Strange 194.

(b) 6 Taunt. 597.

(e) 1 Gow, 74.

(c) 2 B. & C. 65.

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v.
NAISB.

tended to impair the security he had already obtained. But there is no reference in the account to the warrant of attorney, and the only reference to any fact connected with it is as to the sum of 343*l.* 15*s.* 5*d.* realized by the execution. But that is only a credit for the proceeds of that execution, and does not bring the warrant of attorney into the general account. That sum can only be taken to satisfy the judgment so far as it extends. There is no reference to it any where in this account, which was made after the sheriff had levied. Now, it appears that the warrant of attorney was given in part to secure the sum of 104*l.* 0*s.* 10*d.*, being the amount of two bills of exchange for which the plaintiff had given the defendant credit in the first instance. They were not paid, but they were renewed, and the plaintiff was obliged ultimately to pay them. The plaintiff, therefore, had a right to expunge the credit he had given for the amount of those bills of exchange. There does not appear to have been any payment on account of these bills, nor any payment on the balance which the warrant of attorney was given to secure. Now, there is no doubt that where a debtor pays money to his creditor generally, without any specific direction as to the debt in discharge of which it is to be applied,

1834.

DOE *d.* WARNE *v.* ROE.

PALMER moved for judgment against the casual ejector. The service was on the wife of the tenant in possession on the premises. The peculiarity in the case was, that the tenant's Christian names were not stated in the notice. The reason for this was, that the tenant was a foreigner, and, on inquiring of his wife what were her husband's Christian names, she stated that he had so many *French* and *Italian* names that she could not tell without referring to her marriage certificate, and that she could not do, without the consent of her husband.

Service in ejectment on the wife of the tenant in possession on the premises is sufficient, although, from the conduct of the tenant and his wife, his Christian name is not stated in the notice at the foot of the declaration.

TAUNTON, J.—I think that will do, although you do not know the Christian names of the tenant in possession.

Rule granted.

DIXON *v.* BAKER.

O'MALLEY moved for a rule to shew cause why the outlawry against the defendant in this case should not be reversed. The defendant had taken the benefit of the Insolvent Act. The Court discharged him absolutely as to all his debts with the exception of that due to the plaintiff, and, with respect to that, he had been ordered to remain in custody for eight months, unless he should sooner settle the plaintiff's demand. The plaintiff still retained his outlawry in force, and the defendant was afraid of being harassed by that outlawry. The plaintiff could obtain no benefit by retaining his outlawry, and, therefore, there could be no objection to its being reversed.

If a defendant is discharged from an outlawry conditionally on his suffering eight months' imprisonment, the Court will not reverse the outlawry until the eight months' imprisonment have been suffered.

TAUNTON, J.—You are too early in your application.

1834.

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He will not be discharged from the plaintiff's claim until he has suffered eight months' imprisonment. His discharge from that debt is therefore conditional, and until the condition is fulfilled he is not discharged. Suppose he were to escape, and thus forfeit the condition, he would not be entitled to the benefit of his discharge.

Rule refused.

BELL v. TAINTHORP.

If a defendant in an action of replevin, which is made a special jury cause, withdraws his avowries, and the Judge directs him to pay "all costs," that will not include the costs of the special jury.

W. H. WATSON applied to the Court for a direction to the Master to allow the costs of a special jury to the plaintiff. It was an action of replevin, and was made a special jury cause by the plaintiff. At the assizes, the defendant withdrew his avowries on application to the Judge, and an order was made that he should "pay all costs." Before the Master it was contended, that he ought to pay the costs of the special jury, as there was no doubt, that, if the cause had gone on, the Judge would have certified that it was a proper one to be tried by a special jury; and that that must have been the meaning of the words "all costs."

1831.

WESTMACOTT v. COOK.

R. v. RICHARDS shewed cause against a rule *nisi* for cancelling the bail-bond, on entering a common appearance. The defendant had been sued on aailable *latitat*, on which he was not arrested; and an affidavit of debt was made in the year 1831. Since then, he was arrested on a *capias* under a Judge's order, on the original affidavit.

In an affidavit on a bill of exchange, it is necessary to state the amount of the bill.

The objections to the proceedings were, first, that the affidavit was insufficient; and, secondly, that it was stale, in having been made more than a year before. With respect to the second objection, that was clearly cured by the Judge's order to hold to bail. The objection to the affidavit itself was, that it was on a bill of exchange and interest thereon, without stating the amount of the bill itself. If that was a good objection, the Judge's order cured the defect.

John Henderson, in support of the rule, contended, that the first objection could not be cured by the Judge's order, as the effect of the order was merely to enable the plaintiff to arrest the defendant a second time, and left untouched any question as to the affidavit, which was not before the Judge. The non-statement of the amount of the bill of exchange was clearly a defect in the affidavit, which would entitle the defendant to have the bail-bond delivered up to be cancelled. He cited *Brook and Another v. Colman* (a), in which it was held, after the Court of *Exchequer* had taken time to confer with the other Judges, that the amount of the bill must be stated.

TAUNTON, J.—I think this rule should be made abso-

(a) *Ante*, p. 7.

1834.
WESTMACOTT
B.
COOK.

lute, but not with costs. Although the Judge's order is conclusive of all matters brought before the learned Judge at the time of applying to obtain the order, it cannot affect matters not brought before him. Now, it does not appear that this defect in the affidavit of debt was brought to the attention of the learned Judge before he made the order. His order, therefore, cannot be conclusive with respect to it, and the affidavit therefore is to be viewed as if no such order had been made. As to the merits of this application, it appears to me that it has been settled decisively by the case of *Brook v. Coleman*, that the amount of the bill should be specified in the affidavit to hold to bail. That is now the constant practice at chambers. The ground of it is this, that, in an affidavit of debt for 20*l.* on a bill of exchange, unless the principal and interest were distinguished, the bill might only be for 15*l.*, and the residue might be for interest. The interest is in the nature of damages, and does not in general form the ground of an arrest. The present rule must, therefore, be made absolute without costs.

Rule absolute, without costs.

months, as it appeared, that, from the articles not having been stamped at the time of beginning the clerkship, and that consequently those eighteen months would not be reckoned within the five years of service required by law, a separation took place between the attorney and the son of the applicant. Soon after, *Gardner* was sued on the promissory note for 200*l.*, which he had deposited in the hands of the attorney, on the undertaking that it should not be negotiated until the expiration of five years, he having paid it away to another person. He contended that this was an ordinary undertaking, which any person as well as an attorney could have given, and, therefore, could not be enforced summarily against the attorney. The mere fact of his being an attorney was not sufficient to authorize the summary interference of the Court.

1834.
—
Ex parte
GARDNER.

TAUNTON, J.—The ground on which this application was made was, that the attorney having expressly undertaken not to negotiate the promissory note until the expiration of the five years, he had committed a breach of faith in negotiating it before the end of that period. It appears to me, that the rule ought to be made absolute in all its parts, and with costs, for Mr. *Gardner* was compelled to come to the Court in order to enforce the payment of this bill by the attorney.

Rule absolute, with costs.

1834.

SOUTHEE and Another v. TERRY.

If an attorney shew cause on his own behalf, against a rule for a new trial, or a *stet processus*, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the Court; and if that application is not made when the rule is disposed of, the Court will not afterwards amend the rule as to them.

THIS was an action on an attorney's bill. At the trial at *Guildhall*, in the Sittings after *Trinity* Term, 1833, a verdict was found for the defendant.

In the following *Michaelmas* Term a rule was granted, calling upon the defendant and his attorneys, Messrs. *Sylvester & Walker*, to shew cause why a *stet processus* or a new trial should not be granted. The defendant did not appear to shew cause, but only Messrs. *Sylvester & Walker* upon their own behalf. The rule *nisi* (which did not pray for costs) was discharged in the following *Hilary* Term, but no costs were asked for, nor any directions given by the Court as to the payment of them. Upon the taxation of the costs of the action, the Master disallowed the costs of *Sylvester & Walker*, in shewing cause against the rule, as not being costs in the cause.

In the following *Easter* Term, *C. Austin* applied for a rule *nisi* to review the Master's taxation, upon the ground that the costs of *Sylvester & Walker* in shewing cause against the former rule were costs in the cause, or, if they were not, then to allow the rule to be amended by order-

C. Austin, in support of the rule, contended, that the costs of the defendant's attornies, in shewing cause on their own behalf against the rule, were substantially costs in the cause, as much as if they had been incurred by or on the behalf of the defendant himself, and that the rule to review the taxation ought to be made absolute.

1834.
SOUTHEE
v.
TERRY.

TAUNTON, J.—I am of opinion, that the Master has rightly decided that the costs incident to the shewing cause by *Sylvester & Walker* were not costs in the cause; and that, to have entitled themselves to the allowance of their costs, they should have obtained the special directions of the Court at the time; whether the Court would have granted them is not for me to say. The rule must be discharged with costs, to be paid by Mr. *Walker*, the party on whose behalf the application is made.

Rule discharged, with costs.

FREAN v. CHAPLIN.

MANSEL shewed cause against a rule *nisi* for setting aside a judgment, signed by the plaintiff for want of a plea. The facts were, that the plaintiff had declared in last *Hilary* Vacation. In due time he ruled the defendant to plead, and demanded a plea. The defendant however did not plead, and the plaintiff, four days after the demand, signed judgment for want of a plea. He contended, that the judgment was regular; for, by the 2 & 3 *Will. 4*, c. 39, s. 11, it was provided, "That if any writ of summons, *capias*, or detainer, issued by the authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided,

Where a plaintiff declares in vacation, the defendant is entitled to an imparlance, notwithstanding the 2 & 3 *Will. 4*, c. 39, s. 11, and 2 *Reg. Gen. H. T. 4 Will. 4*. (Pleading Rules)

1834.

FREAN
v.
CHAPLIN.

be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation." This case did not come within any of the provisions contained in that section. The question was, whether the plaintiff, having declared in vacation, was not entitled to a plea at the expiration of four days after delivery, without the defendant imparling. He contended, that he was entitled to a plea in the vacation, without the plaintiff's having an imparlance, as the above act had virtually abolished the practice with respect to imparling; for it rendered the proceedings in an action independent of the terms. But the terms alone regulated the practice as to imparlance. In further support of this view, it was ordered, by 2 *Reg. Gen. H. T. 4 Will. 4*, (Pleading Rules), that "no entry of continuances by way of imparlance, *curia advisare vult, vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained (a)." The last case upon the point, previous to the introduction of the late act and rule, was that of *Edensor v. Hoffman and Another* (b). There it was held, that 7 *Reg. Gen. T. T. 1 Will. 4* (c), as

judgment in this case having been signed without giving an imparlance, it was irregular.

1834.
FREAN
v.
CHAFLIN.

TAUNTON, J.—It seems to me, that, under circumstances similar to the present, the defendant would, by the old practice, have been entitled to an imparlance. I do not think that the case of *Edensor v. Hoffman* is relevant to the present. But it seems to me, that there is such a thing still as an imparlance. I do not know of any act of Parliament which abolishes the right of the defendant to imparl, where he would have been entitled to it before the passing of the recent act. I have been referred to the Uniformity of Process Act; and it has been urged, that, since the provisions contained in sect. 11 of that act, there cannot be any such thing as an imparlance. I do not see that that section has done more than to give the plaintiff a greater facility of proceeding; but it does not remove the privilege of the defendant to have an imparlance in cases where, before the passing of the recent act, he would have been entitled to imparl. If he had a right to imparl, the judgment was irregular, and therefore ought to be set aside.

Rule absolute, with costs.

REX v. HOLLOWAY.

THE Attorney-General applied for a rule to shew cause why the amount of the recognizances, which certain magistrates at *Brighton*, in *Sussex*, had required the defendant to enter into, should not be reduced. The facts of the case were these:—The defendant, who is a publican at *Brighton*, had sent a letter to a Mr. *Seymour*, a magistrate at *Brighton*, which the latter considered as

The Court of King's Bench cannot interfere to reduce the amount of security which the magistrates require a defendant to give for the preservation of the peace.

1834.
—
REX
v.
HOLLOWAY.

intended to provoke him to fight a duel. He accordingly applied to the magistrates there, and they required the defendant to enter into his recognizance in 500*l.*, and to obtain two sufficient sureties in 250*l.* each, to keep the peace for two years towards Mr. *Seymour*, and all others of his Majesty's subjects. The defendant, not being prepared with the two sureties, remained in custody until the time of the assizes, when he was tried on an indictment for sending the letter in question, found guilty, and fined a shilling. Still, however, as he had been unable to procure the two sureties required, he was detained in custody. He was of course willing to enter into his own recognizance for the 500*l.*, but he was unable to procure the sureties for the amount required. To keep him in prison until he should procure sureties, which it was impossible for him to procure, was in fact the same as condemning him to imprisonment for two years; while the offence, which gave rise to this proceeding, was only punished with a fine of one shilling. The present application, therefore, was to remove the proceedings into this Court, in order that the amount of the sureties required to be given by the defendant might be reduced. Security to a smaller amount, he might, perhaps, be able to find;

1834.

Ex parte FENN.

MR. FENN (in person) applied for a rule to shew cause why an attachment should not issue against a certain attorney for misconduct, which the affidavit on which the motion was made imputed to him.

An attachment for misconduct cannot be moved for by a complainant in person, but the motion must be made by a gentleman at the bar.

LORD DENMAN, C. J.—An application for an attachment is in the nature of a criminal information, and the Court always requires that such a motion should be made by a gentleman at the bar, in order that it may have the sanction of that gentleman's name for the application. To you, therefore, who apply in person, the Court cannot grant a rule for an attachment.

Rule refused (*a*).

(*a*) See *Ex parte Pitt*, ante, p. 439.

Trinity Term.

IN THE FOURTH YEAR OF THE REIGN OF WILL. IV.

FRITH v. LORD DONEGAL.

ERLE moved that the service of the writ of summons, issued in this case, should be good service, if left at the residence of a Mr. *Mayland*, the late agent of the noble defendant. The action was for the price of certain shoes delivered on his lordship's account at the house of the agent. Various applications had been made to his lordship by letter, he being now in *Ireland*. To these no answers were returned. Attempts had also been made to find him at the agent's, but without success. The Statute of Limitations was about to operate, and the present sum-

The Court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the statute of Limitations; but the plaintiff must proceed according to the provisions of the 2 & 3 Will. 4, c. 39, s. 10.

1834.
 FRITH
 v.
 DONEGAL.

mons had been issued for the purpose of saving it. The object of the present application therefore was, that the service at the agent's house might be good service, in order that the plaintiff might proceed without having his remedy injured by operation of the statute.

PATTESON, J.—It does not appear that there is any precedent for such a mode of service as that which is here sought to be adopted. As the object of issuing the process is to save the Statute of Limitations, and you cannot find the defendant's residence, you may adopt the course pointed out by s. 10 of 2 & 3 Will 4, c. 39 (a). That will answer the purpose of the plaintiff, to prevent his being deprived of his remedy.

Rule refused.

(a) See 3 Dowl. Statutes, 151.

Ex parte LAW.

A defendant
 cited in the Ec-
 clesiastical
 Court must ap-
 pear before he

WIGHTMAN moved for a rule to shew cause why a writ of prohibition should not issue to the Ecclesiastical Court, requiring it to cease from entertaining a certain suit



will not allow his claim of lien, as he has not appeared. It is his business to appear, and then, if he does, and the Ecclesiastical Court will not take notice of his claim, the Court may interfere. He is at present too early in his application.

1834.
 }
Ex parte
 LAW.

Rule refused.

—◆—
 REX *v.* PASMAN and Others.

(Before the four Judges.)

V. LEE moved for a rule to shew cause why the prosecutor, *Whalley*, should not pay the costs of the defendants' preparation for their trial at the *Middlesex* Sessions, under these circumstances:—It was an indictment against the defendants for a conspiracy to strike *Whalley*, who was an attorney, off the roll. The bill was found at the *Middlesex* Sessions, and regular notice of trial given by the defendants. At the day of trial, just before the case was called on, a *certiorari* was produced for the removal of the indictment. Most of the defendants' witnesses were brought from the country, and, consequently, a very great and useless expense was incurred in preparing for the trial at the *Middlesex* Sessions. This expense was rendered useless by the vexatious proceedings of the prosecutor, and, therefore, he ought to be compelled to reimburse the defendants. A rule *nisi* was accordingly granted, and against that rule—

The prosecutor has a right to remove his indictment at any time before trial, and the Court has no jurisdiction over the costs consequent on exercising that right.

Sir *James Scarlett* and *J. Jervis* shewed cause, and contended, that the prosecutor had a right to remove his indictment, by *certiorari*, at any time before trial. If any expenses were caused to the defendants in consequence of the exercise of that right, the Court had no authority to compel the prosecutor to reimburse them.

CASES IN THE PRACTICE COURT, K. B.

N. *V. Lee*, in support of the rule, urged the great hardship inflicted on the defendants, by the harassing proceedings of the prosecutor, and cited *Jones v. Davies and Others (a)*. There, a *certiorari* issued to remove a cause from the Court of Great Sessions in Wales, without any special ground for so doing, and without any notice to the opposite party, and was not delivered to the Judges of the Court till the day before the trial would, in course, have taken place, and after great expenses had been incurred; the Court quashed the *certiorari*, and directed a *procedendo* to issue, and ordered the party obtaining the *certiorari* to pay the opposite party the costs incurred by the latter in the Court below. Again, in *The King v. Bartrum (b)*, upon an indictment for perjury, moved into the King's Bench by *certiorari*, it was decided, that, if the prosecutor give notice of trial to the defendant, and withdraw his record, without countermanding his notice in time, he shall pay costs to the defendant.

Lord DENMAN, C. J.—It appears to me, that, as the *certiorari* issued legally and regularly, the Court cannot interfere, to make the prosecutor pay any costs consequent on the issue of it.

LITLEDALE, J.—In the former of the cases cited in this application, the *certiorari* was improperly first, that some special reason *certiorari* into

much later period of the proceeding, in consequence of the prosecutor not countermanding his notice of trial in due time. I do not see how the Court can interfere in the way which this rule requires.

1834.
 }
 REX
 v.
 PARMAN.

TAUNTON, J., and WILLIAMS, J., concurred.

Rule discharged, with costs.

(Before the four Judges.)

SPRAGG v. WILLIS, the Elder.

PRICE, on a former day, had moved for an attachment for non-payment of the balance found due by the Master's *allocatur* between the attorney of the plaintiff and his client; but, the officer having drawn up the rule *nisi* only, application was now made that the rule might be absolute in the first instance, pursuant to the rule of *Trinity*, 17 Geo. 3, which orders that attachments shall be absolute in the first instance, in three cases, one of which is, "for non-payment of costs on the Master's *allocatur*." In this case, the reference to the Master was of a general bill of costs between attorney and client.

The rule for an attachment for non-payment of costs, pursuant to the Master's *allocatur*, between attorney and client, is *nisi* in the first instance.

The Court, after consulting with the Master, considered this to be a case not coming within the above rule of Court, which applied to the particular costs, as upon the consent rule in ejectment, or upon discharging a rule; here, the bill is in the nature of an account between the parties, and the Master's *allocatur* in the nature of an award.

It was then suggested, that the practice was different in the *Common Pleas* and *Exchequer*, and the Court took time to consult the Judges.

1834.

SPRAGG

v.

WILLIS.

On a subsequent day, the Court stated that the prothonotaries of both those Courts had certified that a rule in such a case, in their Courts respectively, was only *nisi*.

Rule *nisi* granted (a).

(a) *Bray v. Yates*, ante, Vol. 1, p. 459; and *Boomer v. Mellor*, post, p. 533. Tidd's Prac. 480, 9th ed.

FRANCE v. CLARKSON.

The defendant as well as the plaintiff may rule the sheriff to return the writ.

ARMSTRONG moved for a rule to shew cause why the sheriff should not return the writ executed by him in this case, or pay the money deposited in his hands in lieu of bail should not be paid into Court. The facts were, that the defendant, on being arrested, deposited in the hands of the sheriff the amount of the debt claimed, and 10*l.* for costs, pursuant to the 43 Geo. 3, c. 71. The sheriff neither returned the writ, nor paid the money into Court. The defendant was desirous of leaving the money in Court to abide the event of the action, and to pay in 10*l.* more for costs, pursuant to the 7 & 8 Geo. 4, c. 71. This, however, he was unable to do, unless the money was paid into Court. The plaintiff had not ruled the sheriff to return the writ, and there was good reason to suppose he would not. Therefore, the defendant were permitted to rule the sheriff to return the writ, there would be no means

1834.

BOOMER *v.* MELLOR.

WHITE moved for an attachment for non-payment of costs and disbursements by a client to his attorney, pursuant to the Master's *allocatur*. The question was, whether the rule should be absolute, or *nisi* in the first instance.

The rule for an attachment for non-payment of costs between attorney and client is *nisi* in the first instance.

PATTESON, J.—The *allocatur*, in this case, is in the nature of an award; and, therefore, the rule should be *nisi* in the first instance.

Rule *nisi* accordingly.

See Tidd's Prac. 480, 9th ed.; *Bray v. Yates*, ante, Vol. 1, p. 459, and *Spragg v. Willis*, ante, p. 531.

Ex parte DEANE.

C. CRESSWELL applied for a rule to shew cause why a person, who was now an attorney, should not pay over certain sums of money, and furnish an account of others which he had received during his clerkship, to his late master.

The Court will not interfere summarily to compel an attorney to pay over or account for money received by him during his clerkship.

PATTESON, J.—He was not an attorney, it appears, at the time when he became possessed of these sums, and, therefore, the plaintiff cannot interfere summarily. You must have recourse to your action.

Rule refused.

1834.

HORWOOD *v.* ROBERTS.

If a plaintiff does not proceed within two terms after issue is joined, which issue is directed to be tried before the sheriff under the 3 & 4 *Will.* 4, c. 42, s. 17, the defendant is entitled to judgment as in case of a nonsuit, as in ordinary cases.

BARSTOW obtained a rule *nisi* for judgment as in case of a nonsuit. It was an issue directed by a Judge's order, under the 3 & 4 *Will.* 4, c. 42, s. 17 (a), to be tried before the sheriff. After issue joined, the plaintiff had neglected, during two terms, to proceed according to the course and practice of the Court.

R. V. Richards shewed cause against this rule, and contended that a proceeding before the sheriff could not be considered as a proceeding according to the course and practice of the Court. The words of the statute 14 *Geo.* 2, c. 17, "course and practice of the Court," must mean the course and practice of the superior Court.

Cur. adv. vult.

PATTESON, J.—I have referred to the Judges on this subject, and we are of opinion that all proceedings preparatory to the trial of the issue before the sheriff must be considered as the course and practice of this Court; they have, consequently, all the incidents connected with

1834.

HODGKINSON v. HODGKINSON.

(Before the four Judges.)

KNOWLES obtained a rule *nisi* for discharging the defendant out of custody on filing a common appearance, on the ground of a variance between the copy of the writ of *capias* served on the defendant at the time of executing the writ and the original. The original was directed to "the Sheriff of *Middlesex*," and the copy was directed "to the Sheriff of *Middese*." The letter "l" was omitted in spelling the word "*Middlesex*."

If the copy of the *capias* served on the defendant at the time of executing the writ is directed "to the Sheriff of *Middese*," instead of "*Middlesex*," the Court will discharge the defendant on filing a common appearance.

Stephen, Serjt., shewed cause against this rule.—The meaning of the 2 & 3 *Will. 4*, c. 39, s. 4, when it spoke of "a copy," did not mean a copy corresponding in every letter. But here the omission of the letter "l" was nothing more than an allowable contraction of the word "*Middlesex*." The omission here could not be considered as altering the sense, although the sound might be altered. It would scarcely be contended that the defendant had been mistaken in the meaning of the writ, or that he could have been prejudiced; and the Court would hardly decide that the omission of a single letter was sufficient to nullify the copy.

Knowles, *contra*, cited *Smith v. Crump* (a), where it was decided, that, in a writ of summons, if the name of the plaintiff is omitted as the person who will enter an appearance for the defendant, if he enters one, it is an irregularity. There Mr. Justice *Parke* said—"The omission is an irregularity. The statute provides the form in which the summons is to be drawn; and if parties will not take the trouble of looking at the act before they proceed, they

(a) *Ante*, Vol. 1, p. 519.

1834.
HODGRINSON
v.
HODGRINSON.

must take the consequences. If we once enter into the question of what is material, or what is immaterial in the process, we shall have innumerable questions of that sort coming before the Court. The best way is to make parties remember the course they ought to pursue, by setting aside their proceedings for not doing what they ought." This case sufficiently shewed that the Court required the form to be strictly pursued, and would not enter into the consideration of whether the dereliction of it was or was not essential. He submitted that the true rule in such cases was, that, where the omission of a single letter altered neither the sound nor the sense, it was an immaterial alteration; but if it caused a different sound or sense, it was a material alteration. Here, the sound was rendered altogether different by the omission, and therefore it must be considered as material; and, therefore, the execution of the writ must be set aside, and the defendant discharged.

Lord DENMAN, C. J.—The act required, that, where the writ of *capias* is executed, a copy shall be served on the defendant. That must mean that a correct copy shall be served on him. Now, it appears to me that the correct rule of construction, in such a case, is suggested

1834.

DAVIES v. PARKER.

BARSTOW moved for a rule to shew cause why the writ of summons in this case should not be set aside, on the ground of a misdescription of the form of action adopted by the plaintiff. He was aware that the present was an objection *strictissimi juris*; but he submitted that, on the authority of decided cases, as well as principle, it was an objection which ought to prevail. The form of the writ of summons given in the schedule to the 2 & 3 Will. 4, c. 39, (the Uniformity of Process Act), must be strictly pursued. In the case of *Smith v. Crump* (a), where, in a writ of summons, the name of the plaintiff was omitted as the person who would enter an appearance for the defendant, if he did not enter one, although it must be quite clear that the plaintiff was the person who would enter the appearance, the Court held the omission to be an irregularity, and observed—"If we once enter into the question as to what is material or what is immaterial in the process, we should have innumerable questions of that sort coming before the Court." In the case of *Richards v. Stewart* (b), the Court of *Common Pleas* set aside a writ of *capias* on the ground of its describing the cause of action as "an action of trespass on the case," instead of "an action on promises." There Lord Chief Justice *Tindal* said—"I think the more safe and convenient course for the interest of the public will be, to give to the words of the statute, and the forms thereby prescribed, a strict construction, for private convenience must always give way to that of the public; and it will be more convenient for the public that a plain intelligible rule be laid down, capable of being interpreted by any individual." The

"Slander" is a sufficient description of the form of action in a writ of summons.

(a) *Ante*, Vol. 1, p. 519.

(b) 3 M. & Scott, 774.

1834.

DAVIES
v.
PARKER.

case of *King v. Skeffington* (a) was to the same effect. In the case of *Hodgkinson v. Hodgkinson* (b), which had come before the full Court of *King's Bench* shortly before, the Court had carried the rule to a greater extent than any other of the cases which he had cited—there, the writ was directed “to the sheriff of *Middlesex*,” and the copy served on the defendant was directed “to the sheriff of *Middlesex*.” The Court there held that to be an irregularity, and discharged the defendant out of custody on entering common appearance. These authorities shew that the form of the writ in the schedule must be strictly pursued. Now, what was required by the schedule with respect to the form of action? It required that the generic term expressive of the form of action adopted by the plaintiff should be stated in the writ. But here, only a particular instance of a genus of action was stated, instead of the genus itself. The action of slander, it was true, was an action on the case; but it was only one instance of that genus of action, and that was not in conformity with the provisions of the statute.

PATTESON, J.—It seems to me that greater information is given to the defendant by using the words “action of slander” than by using the words “action on the case.”

set aside a writ of summons, on the ground that the description of the form of action adopted by the plaintiff stated in the writ, was "an action of slander," instead of "an action on the case." It is to be observed, that the act of Parliament is not quite correctly drawn in some particulars. The phrase, "an action on promises," is untechnical for there is no such thing, strictly, as an "action on promises;" but it appears to have been the object of the legislature to convey information to the defendant as to the nature of the action to be brought against him; and I think that the phrase, "action of slander," conveys information to him better than the phrase "action on the case" could. The rule now prayed for, therefore, cannot be granted.

1834.
 DAVIES
 v.
 PARKER.

Rule refused.

Ex parte DOBSON.

V. WILLIAMS applied for leave of the Court for the admission of a gentleman named *Dobson*, next *Michaelmas* Term, under these circumstances:—Mr. *Dobson* had served his clerkship with three different gentlemen at *Lancaster*. The name of one of these gentlemen was *Robinson*. The person to whom he gave instructions to stick up the necessary notices, pursuant to *R. T. 31 Geo. 3 (a)*, and *R. T. 33 Geo. 3 (b)*, outside the Court and in the *King's Bench* office, had, by mistake, put the name of "*Roberts*," instead of "*Robinson*," into those notices: the mistake was only discovered on the ninth day of the term, and the application now made was, that the notices might now be amended, and be considered sufficient to entitle the applicant to admission in the next term. It was a mere accident, and the Court would, under those circumstances, perhaps, feel inclined to relax the strict

The right names of all the persons with whom a clerk has served during the five years must be introduced into the notices of his intention to apply for admission.

(a) 4 T. R. 379.

(b) 5 T. R. 368.

1834.

Ex parte
DOBSON.

rule, which required that the names of all the persons with whom the clerk had served should be introduced into the notice. He had got an affidavit, shewing that there was no person named *Roberts*, an attorney, at *Lancaster*.

PATTESON, J.—It seems to me that the notice will not be sufficient; for, in the case of *Ex parte Jones* (a), it was held, that if, during the five years, a clerk is assigned for a certain period, and, at its conclusion, re-assigned to his original master, the name of the assignee must be stated in the notices of the clerk's intention to apply for admission. I will, however, consult the other judges.

Cur. adv. vult.

PATTESON, J.—I am sorry to state, that, after consulting the other Judges, we are all of opinion that the Court cannot assist this gentleman. He must wait now until next *Hilary* Term before he is admitted (b).

V. Williams, therefore, took nothing by his motion.

(a) *Aute*, Vol. 1, p. 439.

(b) *Ex parte Stokes*, 1 Chit. Rep. 556, accord.

arbitrator, and he had directed that judgment for a certain sum should be entered up for the plaintiff in each action. The present application was to set off one judgment against the other, without regard to the attorney's lien. He was aware of the rule of *Hilary Term, 2 Will. 4*, on the point, but he submitted that, as both judgments arose out of one award, it might be an exception to the rule.

1834.
 DOMETT
 v.
 HELYER.

PATTESON, J.—I cannot allow one judgment to be set off against the other, except on the condition of satisfying the attorney's lien. The 93rd section of 1 *Reg. Gen. H. T. 2 Will. 4* (a), expressly orders, that, "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought." Unless the attorney's lien, therefore, is satisfied, the set-off cannot be allowed.

Rule granted on those terms.

(a) *Ante*, Vol. 1, p. 196.

FORTESCUE'S Bail.

CROWDER opposed bail, on the ground that he had two residences, one in *Kent*, and the other in *London*, and only one of them, namely, the residence in *Kent*, was given in the notice of bail. The second rule of *Trinity Term, 1 Will. 4* (a), required the notice to state "the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months." The statement of one of the places of his

If a bail has two places of residence, it is only necessary to state one of them in the note.

(a) *Ante*, Vol. 1, p. 103.

1834.
 ———
 FORTESCUE'S
 Bail.

residence could not be considered as a compliance with the rule.

Comyn, in support of the bail, cited an *Anonymous case* from the first volume of Mr. *Dowling's Practical Cases* (a), where it was decided by Mr. Justice *Parke*, that, if a bail has two places of residence, it is only necessary to state one in the notice.

PATTESON, J.—I think that is a very right decision; and I concur with what my Brother *Parke* there said, “that the object of the rule was to trace the party for six months in one residence.” The notice, therefore, is in my opinion sufficient.

Bail allowed to pass.

(a) Page 159.

DOE d. THOMAS v. FIELD.

If a landlord
 allows his te-
 nant to hold
 over above a

BALL moved, on the part of the landlord, who was the lessor of the plaintiff, for a rule to shew cause why the tenant in possession should not enter into the undertak-

1834.

WITTAM v. URRY.

BOMPAS, Serjt., and **Butt**, shewed cause against a rule *nisi* for entering a suggestion on the roll to deprive the plaintiff of costs, on the ground that the debt for which the plaintiff had obtained a verdict was recoverable in the Court of Requests' Act of the *Isle of Wight*, (46 Geo. 3, c. 66). It was an action of waste, and was tried at the last *Winchester* Assizes, and a verdict found in favour of the plaintiff for one farthing damages. The question was, whether an action of waste came within the meaning of the act on which the motion was founded? It was clear that it did not. The preamble was in these terms:—
 “Whereas the *Isle of Wight* has lately become very populous, and the trade thereof much increased, and the several parishes, townships, and places within the same are much connected in trade and business: and whereas many persons within the said island often contract *small debts*, and, although able, refuse to pay the same, presuming on the discouragement which creditors lie under from the expenses they are unavoidably put to, and the delay they meet with, in suing for such *debts* in Courts of law: and whereas it would tend to promote industry and support useful credit if some easy and speedy method was established for the recovery of *small debts* within the said island;” and then it proceeds to direct the appointment of certain commissioners for the trial of “all causes for the recovery of *small debts*.” Then, by section 11, it is provided, “that it shall and may be lawful to and for the said commissioners, and they are hereby authorized and empowered, to decide and determine all disputes and differences between party and party for any sum not exceeding five pounds, in all actions or causes of debt, whether such debt shall arise from any bond, bill, or specialty for payment of money only, or any promissory note or inland bill of exchange,

An action for not using a farm in a tenant-like manner is not within the meaning of the 46 Geo. 3, c. 66, (the *Isle of Wight* Court of Requests' Act).

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or for rent upon leases, articles, minutes, and in all causes of *assumpsit* and *insimul computasset*, and in all causes or actions of trover and conversion, and in all causes and returns founded on a *quantum meruit*, and in all causes or actions of trespass or detinue for goods and chattels taken or detained." Then, by section 40, it is provided, "that if any action or suit for any *debt* recoverable by virtue of this act in the said Court of Requests shall be commenced in any other Court whatsoever, or elsewhere than in the said Court of Requests (save and except the Court of the Corporation of *Newport*, and the Court called the *Knighton Court*), then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever." From the language of the act throughout, it must be clear that *debts* or liquidated demands must be the species of claims over which the commissioners have jurisdiction, and not unliquidated demands. The action of waste could only apply to unliquidated demands, and therefore was not within the act. They cited *Jonas v. Greening*(a) and *Sandby v. Miller*(b).

Bingham, *contra*, contended that it was clear, that, although the word "debt" was used in the act, it must mean the "sum" which was to be recovered, notwithstanding the form of action might be for damages. If this meaning of the word, the in-

debts." But the claim of the plaintiff in the present case is nothing in the nature of a debt, for it is an action against the tenant for waste. There is nothing here for which he could have held the defendant to bail. It is for unliquidated damages. This case does not, therefore, come within the purview of the act of Parliament. Now, what is the letter of it? The act (s. 11) gives the commissioners jurisdiction "to decide and determine all disputes and differences between party and party, for any sum not exceeding 5*l.*, in all actions or causes of debt, whether such debt shall arise from any bond, bill, or specialty, for payment of money only, or any promissory note, or inland bill of exchange, or for rack rent upon leases, articles, minutes, and in all causes of *assumpsit* and *insimul compulasset*, and in all causes or actions of trover and conversion, and in all causes and returns founded on a *quantum meruit*, and in all causes or actions of trespass, or detinue for goods and chattels taken or detained." Now, the only word under which it might be supposed that the commissioners would have jurisdiction is the word "*assumpsit*." But that clearly means *indebitatus assumpsit*, and, therefore, implies a liquidated money demand, and not merely a claim for damages. It is therefore clear that the action of waste does not come within that clause. Then the clause (s. 40) which provides the penalty, being only co-extensive with the other clauses, there is no power for the Court to direct the entry of a suggestion to deprive the plaintiff of his costs. The present rule must, therefore, be discharged with costs.

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Rule discharged, with costs.

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ALLEN v. COOK.

An acknowledgment by a defendant, after action brought, of money being due to the plaintiff, when there is no debt or account between them proved to have existed before action brought, is not evidence in an account stated.

THIS was an action of *assumpsit*. The declaration contained a count on a bill of exchange by the indorsee against the acceptor, the money counts, and a count on the account stated. At the trial, when the bill was produced, it had no stamp on it. The plaintiff then resorted to the count on the account stated, and the evidence he gave in support of it was that of the person who went to serve the writ of summons, who stated, that, when the defendant saw the amount of 19*l.* indorsed on the writ, he said—"I have paid 7*l.*, and therefore only 12*l.* remain due." The jury found for the plaintiff, and a rule *nisi* was obtained to set aside the verdict, and enter a nonsuit on the ground that the acknowledgment made by the defendant was not sufficient, under the circumstances, to support a count on an account stated.

Platt was heard, to shew cause against this rule; and *Butt* in support of it.

Cur. adv. vult.

TAUNTON, J.—It appears to me, that this acknowledg-

'of and concerning divers sums,' as to the count for goods sold. If the count be good, it is enough if the plaintiff prove any part of it." So, the acknowledgment of one part of the amount by the defendant is sufficient to support a count on the account stated. The rule *nisi* to set aside the verdict was obtained on the ground that there was no evidence whatever in support of the plaintiff's claim, until after the writ of summons had been sued out. Being after the writ of summons, it was contended that it was too late. I am of opinion that it was clearly too late. It might be otherwise if there had been an anterior debt, or anterior account in evidence, to which the promise or acknowledgment might have applied. But here, there was no prior debt. There was nothing to which it could apply, except the demand indorsed on the writ. There was, therefore, no evidence sought to be given on the account stated, except the one acknowledgment, which was not evidence of any debt prior to the action being brought. That acknowledgment being after the writ was sued out, it could not be given in evidence in support of the count on the account stated. The present rule must, therefore, be made absolute.

Rule absolute.

TURNER v. BROWN.

ERLE shewed cause against a rule *nisi*, obtained by *W. H. Watson*, for discharging a rule for bringing in the body of the defendant. The facts of the case were these:—A *capias* had issued on the 14th *March*, directed to the constable of *Dover*, indorsed with bail for 5*l*. On the 15th of *April*, the defendant was arrested, and a bail-bond taken. On the 21st *April*, the defendant rendered to prison, and on the 24th the plaintiff ruled the constable to return the writ. His return was, that he had arrested the

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Although a bail-bond is given, a tender may be accepted at any time within eight days from the time of the arrest.

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defendant, and had him in prison, without saying any thing about the bail bond. The plaintiff afterwards applied to the constable for an assignment of the bail-bond, but that he refused to execute. The plaintiff then ruled the constable to bring in the body. This rule it is now sought to discharge. The plaintiff complains, that, as the defendant had been arrested and had given a bail-bond, the defendant was not properly rendered without putting in bail above. The plaintiff would have a right to proceed either against the sheriff, or on the bail-bond. The constable having arrested him, and discharged him on giving a bail-bond, he had no right to allow him to render without putting in bail above. If such a course were allowed to be adopted, and the constable were not ruled to bring in the body, as the writ is in force for four months, he might allow the defendant to go at large until the four months had expired, he being perfectly safe during that time from having the security of the bail-bond, and at the end of that time the defendant might render, and the constable put the bail-bond into the fire.

W. H. Watson, contra.—First, the Uniformity of Process Act makes no difference in the duty of the sheriff or constable from what it was before: the eighth day from the

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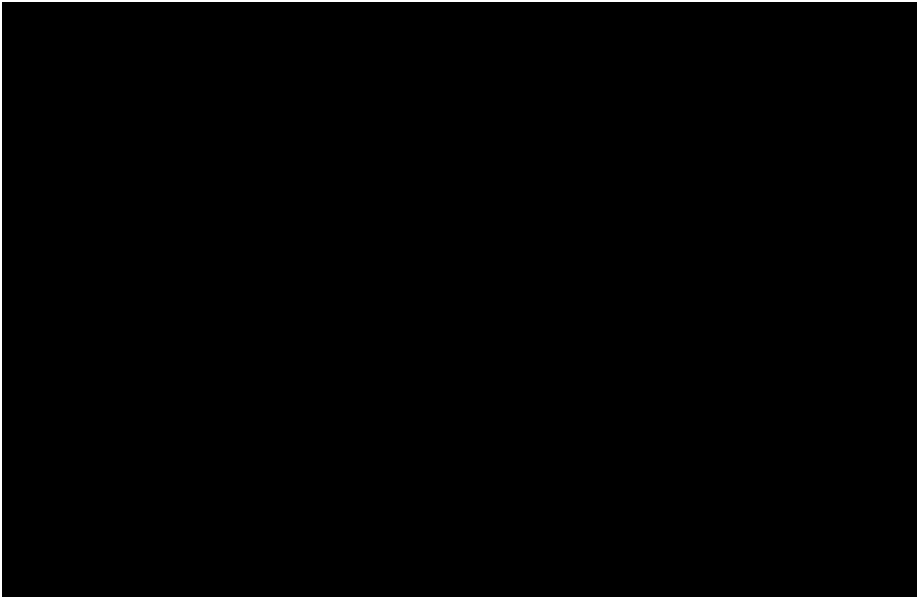
der himself to the sheriff before the return of the writ, the bail-bond may be given up, and it will be considered as if no such bond had been given. Again, in *Plimpton v. Howell and Another* (a), where the principal surrendered to the gaoler at the county gaol in discharge of his bail to the sheriff, before twelve o'clock on the first day of term, that being the return-day of the writ, and the undersheriff signified his consent to the surrender by return of post the next day, at the distance of seventeen miles, the Court held that surrender sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of the surrender. Now the question is, does the Uniformity of Process Act make any difference on this point? It is directed by sect. 4 of the 1 & 2 Will. 4, c. 39, that the sheriff shall indorse on the writ the true day of the execution thereof, whether by service or arrest. The writ requires the defendant, within eight days after the execution of it, to put in special bail; and in the third warning to the writ it is stated, that, "if a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond." The rule, with respect to putting in bail by the return-day, is consequently the same as it was before this act passed; and the eighth day is in the same situation as the old return-day was. A bail-bond is now taken, that the defendant shall put in bail eight days after the arrest. Now the statute of Hen. 6 requires that the bail-bond shall be taken for the appearance of the defendant on the return-day of the writ, and not otherwise; now it has been held that a bail-bond conditioned to appear in eight days is good. It is the duty of the constable or sheriff to take care that the person so arrested should appear on the return-day of the writ. But neither the third warning nor any other part of the act

(a) 10 East, 100.

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affects the right of the sheriff or constable to accept a render before the expiration of the eight days. He may still accept a render within that period, the bail-bond being only for his own protection. It never was in the contemplation of the statute to alter either the situation of the sheriff or the constable. But, supposing the third warning to have altered the law on this point, the course which the plaintiff ought to have pursued was not to rule the constable to bring in the body. His remedy here was to demand the bail-bond, and bring an action on the 4 & 5 *Anne*, c. 16, for not assigning it, or to move the Court to compel the sheriff to amend his return. And he cited *Rex v. Sheriff of Wilts* (a).

PATTESON, J.—The return here made was the common return, that the defendant remained in the prison of our lord the king. The plaintiff has no right to treat that as a return of *cepi corpus et paratum habeo*. I think that the render was right, and that after such a return the plaintiff was not entitled to rule the constable to bring in the body. He might have moved for the purpose of compelling him to amend his return, or have brought an action against him for not assigning the bail-bond.



torney, and the action was for rent. The venue had been changed from *Middlesex* to another county on the common affidavit. The plaintiff obtained the present rule to bring back the *venue*, on the ground of his being an attorney. The answer which he had to this rule was, that he had been re-admitted only two days before he brought the present action; that he had taken out his certificate, but had not yet entered it, which he must do before he could be entitled to the privilege of keeping the venue in *Middlesex*. Unless he entered his certificate, he was liable to a penalty. By the 37 *Geo. 3*, c. 90, s. 27, it was enacted, "that every certificate so to be obtained as aforesaid, shall be entered in one of the Courts in which the person described therein shall be admitted, inrolled, sworn, or registered with the respective officer or officers of the said Courts, appointed by the said act to grant certificate of inrolment, admission, or register, within the time herein before described, or before such person shall be permitted to practise as aforesaid." Until, therefore, the certificate was entered, he was not entitled to practise as an attorney, and, if he did, he would be liable to a penalty of 50*l*.

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PATTESON, J.—The word "attorney" means there a person who is attorney for another.

Wightman.—He is not entitled to the privileges of an attorney unless he enters his certificate, without reference to the provisions of the Uniformity of Process Act.

PATTESON, J.—It has been determined that an attorney defendant is entitled to his privilege notwithstanding that act. An attorney who has omitted to take out his certificate has been entitled to his privilege during the year. Now, in this case was he not properly on the roll, although his certificate was not entered?

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Wightman.—Surely, he cannot, in the teeth of this act of Parliament, avail himself of his privilege as an attorney.

Kelly, in support of the rule.—The question here is, not whether the plaintiff may or may not be liable to certain penalties by an act of Parliament, but whether he is entitled to the privilege of retaining the venue in *Middlesex*. There is nothing in the recent act for the Uniformity of Process depriving him of his privilege. Therefore, the case is simply this: the plaintiff brings his action, laying his venue in *Middlesex*; the venue is changed on the common affidavit; and he now desires to bring it back, on the ground of his being an admitted practising attorney.

PATTESON, J.—I rather think an attorney is entitled to his privilege from the mere fact of his being on the roll; and that if he does not obtain and enter his certificate before he practises, that is a matter of application against him for any penalty he may thereby incur; but he is not thereby deprived of his privilege of keeping the venue in *Middlesex*. The present rule must, therefore, be made absolute, with costs.

Rule absolute, with costs.

ver the sum of 29*l.* 18*l.* 6*d.*, and the defendant agreed to sign a *cognovit* for 21*l.*, with costs as between attorney and client. The *cognovit* was signed on the 24th of *July*, but no judgment was to be signed, or execution issued, until the 2nd of *November*. On the 6th of *August* a *fiat* of bankruptcy was issued against the defendant, and, in the month of *March* following, he obtained his certificate. The plaintiff did not prove his debt on the *cognovit* under the *fiat*, but taxed his costs, and entered up judgment on the *cognovit* on the 13th of the following *May*. He afterwards issued a *ca. sa.*, on which the defendant was arrested. The question is, whether the defendant is discharged from the *cognovit* by his certificate. In the case of *Wyborne v. Ross* (a), the Court held that a *cognovit* is not discharged by bankruptcy and certificate. That case is directly in point.

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PATTESON, J.—Some doubt, however, has been cast upon the correctness of that decision.

C. Cresswell.—The case of *Haswell v. Thorogood* (b) is similar in principle to the present. There, a cause and all matters in difference were referred, at *Nisi Prius*, to an arbitrator, and he found a sum of money to be due from the plaintiff to the defendant, and ordered that sum to be paid to the latter. Between the time of making the order of reference, and taxing costs, and signing judgment, the plaintiff became bankrupt. There Lord *Tenterden* said—“ Here, the plaintiff became bankrupt before judgment was signed. The costs of the cause did not constitute any debt until judgment was signed; for there is no distinction, in this respect, between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles a defen-

(a) 2 Taunt. 58.

(b) 7 B. & C. 705.

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dant to tax his costs, but no debt arises, and no action can be maintained for them until judgment is signed. The case of *Walker v. Barnes* (a) is a decisive authority to shew that the amount of these costs could not be proved as a debt under the plaintiff's commission; and if that be so, then he is liable to pay them." So, the costs in this case could not constitute a debt until judgment was signed, and therefore could not have been proved under the *flat*. There do not appear to be any direct authorities on the point, except the case of *Wyborne v. Ross*; but it should seem that the legislature considered, that, without a provision on the subject, there was no debt unless the plaintiff had a judgment, for, by sect. 34 of the 7 *Geo. 4*, c. 57 (the Insolvent Act), it is provided, "That in all cases where any prisoner who shall petition the said Court for relief under this act shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure or sale of the property of such prisoner, or any part thereof, or by

they being accessory to, and depending on, the debt, and the debt being barred, they must be barred also. In the case of *Riley v. Byrne* (a), the question was, whether the certificate was a bar to a claim for costs, which could only be enforced by attachment. It was an action for a libel, and the defendant compromised it by agreeing to apologise and pay the plaintiff's costs. The apology was made, and a rule of Court obtained, ordering the defendant to pay the costs, amounting to 67*l*. He made default; an attachment issued; and he was committed. While in custody he became bankrupt, and obtained his certificate. The Court there held, that the sum named in the rule of Court was a debt, which might have been proved under the commission, and that the defendant was consequently discharged from the debt.

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PATTESON, J.—The case of *Wyborne v. Ross* was very much doubted as law by Lord *Tenterden*, in the case of *Vansandon v. Crosbie* (b). There he says of it—"The case cited as an authority does not appear to me to throw any light upon the subject; nor can I see the ground upon which that case was decided."

Cur. adv. vult.

PATTESON, J.—I think the defendant in this case ought to be discharged from the *cognovit*. I take the rule to be, that, where the cause of action itself is proveable under the *fiat*, the costs attending it are discharged by the certificate. As the debt in this case was proveable under the *fiat*, the costs were proveable also, and consequently the certificate discharges him from both. My difficulty was, whether the *cognovit* having been for costs as between attorney and client, that made any difference. I think it does not. The case of *Haswell v. Thorogood*

(a) 2 B. & Adol. 779.

(b) 1 Chit. Rep. 16.

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is not exactly in point, because those were the defendant's costs; and whatever is the nature of the action, whether *tort* or debt, it is held, that no debt exists until the costs are taxed. The nearest case is that of *Ex parte Poucher* (a), where it was decided, that in an action upon contract, where the verdict is before and the judgment after the bankruptcy, the costs are proveable. In that case, however, there was not the ingredient of the costs being those between attorney and client. The Court there held, that the certificate discharged the bankrupt from those costs. Now, this *cognovit* is either an agreement to pay a certain sum, or to pay what shall be found due on taxation. If it be to secure a sum certain, it is clear that it was proveable, and, if it be to secure what should be found due on taxation, it was also proveable, because the amount might be ascertained, and the *cognovit* was given before the *fiat* issued. Therefore, *quâcunque viâ*, the certificate is sufficient to discharge him. The present rule must, therefore, be made absolute.

Rule absolute.

(a) 1 Glynn & Jam. 385.

writing of the defendant and of the attesting witness, and accounts for the absence of his clerk, by shewing that he has absconded; that he has not seen him since he left his service; that he has made diligent search for him, but has been unable to find him. He does not, however, state the nature of the search he has made (a). But the office of his late master, where he spent the principal part of his time, is the proper place for inquiring after him; and an affidavit, shewing that endeavours had been made to find or hear of him there, would have satisfied the rule. If so, this affidavit of the master himself is sufficient.

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PATTESON, J.—I think this is sufficient under the circumstances; and, therefore, you may take your rule.

Rule granted.

(a) *Waring v. Bowles*, 4 Taunt. 132; *Jones v. Knight*, 1 Chit. Rep. 743.

MULLINS v. BISHOP.

C. AUSTIN moved for a rule *nisi* for judgment as in case of a nonsuit, or such other rule as the Court should think the defendant entitled to obtain. Issue was joined on the 28th April. Notice of trial was given on the 29th for the Sittings after *Easter* Term. On the 29th, an order was obtained from a Judge under the 3 & 4 Will. 4, c. 42, s. 17, for the trial of the issue before the sheriff of *Middlesex*. Since the order had been obtained, no notice of trial had been given, or any further steps taken. It appeared by affidavit, on which he moved, that the usual days on which trials took place at the sheriff's office were *Tuesdays* and *Thursdays* in every week. The present application, therefore, was, that the defendant might obtain a rule for judg-

Where a plaintiff obtains an order under the 3 & 4 Will. 4, c. 42, s. 17, for the trial of an issue before the sheriff, the Court will compel him to proceed within a reasonable time.

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ment as in case of a nonsuit, or such relief as the Court could grant.

PATTESON, J.—You may take a rule *nisi*, calling on the plaintiff to shew cause why he should not take further proceedings for the trial of the cause within a fortnight; or why judgment as in case of a nonsuit should not be signed.

Rule *nisi* accordingly.

THE rule was afterwards made absolute for judgment as in case of a nonsuit. The matter was mentioned to the Court, but no cause was shewn.

HUNT v. ROUND and Another.

The sureties in a replevin-bond are only liable for the value of the goods seized and double costs; and if that value exceeds the

R. V. RICHARDS shewed cause against a rule obtained by *Tomlinson*, calling on the plaintiff to shew cause why, on the payment of 260*l.*, and 150*l.* for costs, and the costs of the application, the proceedings in this case, which was an action on a replevin-bond, should not be stayed. The affidavit on which the rule had been obtained

arrear, and the double costs. In the case of *Evans v. Brander and Another* (a), which was an action on the case against the sheriff for taking insufficient pledges in replevin, the Court held him to be liable in damages to the extent of double the value of the goods distrained, though no further. Here, it is not sought to compel the payment of more than the amount of the rent due, although, if it were equal to, or exceeded the double value of, the goods distrained, proceedings could not be stayed, except on payment of the full amount of the sum secured by the bond, as well as the double costs. Again, in the case of *Baker v. Garratt and Venables* (b), which was a similar action to the last, it was held that the assignee of the replevin-bond cannot recover as special damage (beyond the penalty of the replevin-bond), the expenses of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them. In the case of *Porter and Others v. Henry Hoste and Others* (c), it was held that the liability of sureties in a replevin-bond is limited to the amount in arrear at the time of the distress, and costs. These authorities shew to what extent the sureties must be considered as liable. The only case, which appears to be in opposition to these decisions, is that of *Scott v. Waithman and Another* (d), which was an action against the sheriff for taking insufficient sureties in replevin; and Lord *Tenterden* observed in his direction to the jury, that, "as the verdict in the replevin suit was merely for a return of the goods, the jury could not, in their verdict, exceed the value of the goods." That, however, was merely a *Nisi Prius* decision, standing alone, and could not be considered sufficient to overrule the other decisions already cited.

Tomlinson, in support of the rule.—The defendants here

(a) 2 H. Black. 547.

(c) 1 Y. & J. 285.

(b) 10 Moore, 324; 3 Bing. 56.

(d) 3 Stark. 168.

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seek to stay proceedings, by paying the value of the goods distrained, and the double costs. If the plaintiff in the replevin suit had proceeded and failed, the landlord could only have recovered the value of the goods distrained, or the goods themselves, and the double amount of costs which might at that time have been incurred. We offer, therefore, on staying proceedings, all which he could be entitled to receive by proceeding. That which is the measure of liability in an action against the sheriff must be the measure in an action against the sureties. And Lord *Tenterden*, in the case of *Scott v. Waithman and Another*, was of opinion, that the measure would be the value of the goods distrained. The case of *Austin v. Howard (a)*, though not exactly in point, may be considered as supporting the same principle. There, the sheriff took a replevin-bond from one surety only, and the person making cognizance sued him for taking insufficient pledges, and recovered as damages the amount of the rent only, which was less than the value of the goods and costs in the action. The sheriff sued the surety on his bond, and assigned breaches under the 8 & 9 *Will. 3*, c. 11. The Court held, that he was only entitled to recover against the single surety, and was deprived of calling on his co-surety

PATTESON, J.—This was an application made by Mr. *Tomlinson* to relieve the sureties in a replevin suit, on payment of the value of the goods seized by the landlord (260*l.*), the double costs of the replevin suit and the action (150*l.*), and the costs of this application. The question is, whether the liability of the sureties is confined to the value of the goods seized and the double costs, or extended to double that value in liquidation of the rent due? It is contended by the plaintiff that the defendant's liability is to the latter extent. I cannot, however, find any such rule laid down by the Courts. In *Yea v. Lethbridge* (a) it was decided, that, in an action against the sheriff for not taking sufficient pledges in replevin, the plaintiff cannot recover damages beyond the value of the distress. That case, however, was overruled by *Concanen v. Lethbridge* (b), in which it was held, by the Court of *Common Pleas*, that the plaintiff might recover damages beyond the penalty of the bond, that is, for more than double the value of the goods distrained. But, in the case of *Evans v. Brander and Another* (c), the same Court, three of the Judges having been changed, decided that the sheriff was only liable for double the value of the goods distrained. But, on looking at all those cases, it appears that the amount of the rent in arrear was exceeded by the value of the goods distrained. Therefore, they do not decide the question raised in this case. The case of *Scott v. Waithman* does not appear to me to settle the question; for, the report does not shew what was the value of the goods seized, or what was the amount of the rent in arrear. But it merely states, that the jury found a verdict for 70*l.* damages. It seems to me, that the intention of the legislature in passing the 11 *Geo. 2*, c. 19, was to place the parties in the same condition, with respect to the goods seized, as if no replevin-bond had been

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(a) 4 T. R. 435.

(b) 2 H. Bl. 36.

(c) 2 H. Bl. 547.

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executed. Let us see, then, what would be the consequence, as there is a replevin-bond, if the defendant ultimately succeeds. At common law, the landlord had only his remedy against the person who brought the action of replevin. The replevin-bond, however, gives him the additional security of the sureties and the double costs. That is the whole effect which the act can have had. It seems to me, then, that the penalty of the bond given by the sureties ought only to stand as a security for the value of the goods seized, if the rent amounts to so much, or for the amount of the rent, if it is less than the value. Thus, if the value of the goods was 100*l.*, and the amount of the rent 20*l.*, the penalty would only secure the amount of 20*l.*, and not 100*l.* Otherwise, the landlord would be entitled to 80*l.* more than the rent really due. The proceedings in this case may, therefore, be stayed on payment of the value of the goods distrained, the double costs, and the costs of this application. The latter costs may be considered as costs in the action, because, if the action had proceeded, the plaintiff would have been entitled to all the costs.

Rule absolute accordingly.

The facts were these:—The defendant was a constable at *Portsmouth*, and had taken a person named *David Parker* into custody on a charge of manslaughter. When he apprehended him, he took from him a sum of 15*l.* and a watch, which the prisoner said had been bequeathed to him by the deceased. The prisoner was afterwards tried and acquitted of the charge. It was suggested that the money and watch, which he had so taken from the prisoner, had been stolen by him from the deceased. Both money and watch were accordingly demanded from the defendant by the administrator of the deceased, the present plaintiff. They were also demanded by the prisoner. The present action was accordingly commenced against him for the money, and an action of *trover* threatened for the watch. The acquitted prisoner still persevered in his claim; and, therefore, the defendant had come to the Court to obtain the protection which the act afforded. As an action of *trover* was threatened for the watch, it was hoped that the Court would also make the determination of the claims to it part of the present rule.

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v.
LINNETT.

PATTESON, J.—The Court cannot interfere under the first section, where a proceeding is only “threatened” against the stakeholder. The words of the act are “any defendant sued,” and the application must be made “after declaration.” It is different in the case of a sheriff, where it is sufficient, to entitle a sheriff to relief, that a claim should be made. You can, however, take your rule as to the money for the recovery of which the action is brought.

Rule *nisi* granted.

CAUSE was afterwards shewn against this rule by *Follett* for the plaintiff, and *Sewell* for *David Parker*, the claimant; and it was ordered, that the latter should be substi-

1834.
PARKER
v.
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tuted in the action for the defendant, and the case referred to the Master to decide on their respective claims, the defendant to be discharged from all liability on bringing the money into Court.

Miller then applied for the costs of the rule. The defendant had no interest in the matter, and had acted with good faith in the affair. He stood in the situation of a private person; and, therefore, ought not to be deprived of his costs, according to the practice adopted by the Courts in the case of sheriffs and others employed in the execution of process. The burthen cast on him as constable was sufficiently onerous, without compelling him to be at the expense consequent on such applications as the present. He cited *Ducar v. Macintosh* (a), and *Cotter v. The Bank of England* (b), which were cited in *Dowling's Practice* (c), where it was decided, that, if the party applying appears to have acted with good faith, his costs will be ordered to be paid out of the fund or proceeds of the property in question, and to be repaid by the ultimately unsuccessful party.

PATTESON, J.—The costs which the defendant in this

1834.

FRENCH v. MAWWOOD.

MILLER applied for a *habeas corpus* to bring up the defendant out of the custody of the warden of the *Fleet* Prison, where he was detained for a contempt of the process of the Court of *Chancery*, in order that he might be charged in custody of the marshal of this Court on a bill of *Middlesex*. The object of the application was to prevent the operation of the Statute of Limitations. Several years since, a bill of *Middlesex* issued against the defendant, which was continued by writs of *latitat* into several counties. On no one of these could the defendant be arrested, as he managed to keep out of the way; at length it was discovered that he was in the custody of the warden of the *Fleet* for a contempt of the Court of *Chancery*. The last writ was a *latitat*, and it was proposed to continue that writ by a bill of *Middlesex*, as a writ of *capias* would not be a good continuance of the action. That a bill of *Middlesex* was a good continuance of the action was decided in the case of *Page v. Newman* (a).

A bill of *Middlesex* is a good continuance of a *latitat*, in order to save the Statute of Limitations.

PATTESON, J.—That, certainly, is an authority that a *latitat* may be continued by a bill of *Middlesex*. You may, therefore, take your rule.

Rule granted.

(a) 2 Mann. & Ryl. 528; 8 B. & C. 489.

1834.

PALMER v. TERRY.

If a defendant moves to change the venue as of right, it is not sufficient to swear that the cause of action did not arise in the county stated in the declaration, and that it will be inconvenient for him to try there. He must make the ordinary affidavit, shewing in which county the cause of action did arise.

BARSTOW shewed cause against a rule for changing the venue.—It was an action for negligence against the defendant, as the bailee of certain wooden carvings, which the defendant had borrowed from the plaintiff, and exhibited in different places. The plaintiff laid his venue in *Somersetshire*, and the defendant applied to have it changed to *Middlesex*. In his affidavit he did not state in the ordinary form that the cause of action, if any, arose in *Middlesex*, and not elsewhere; but he stated that the cause of action, if any there be, did not arise in the county of *Somersetshire*, as laid in the declaration, and that it would be very inconvenient for him to have the cause tried in *Somersetshire*, as many of his witnesses, whom he should be under the necessity of calling, resided in *Middlesex*. It was clear from this affidavit, that he was conscious he could not swear that the cause of action arose in *Middlesex*, and not elsewhere; and, therefore, he thought to impose on the Court by stating it not to have arisen in the county of *Somerset*. It was impossible for him to swear that the cause of action did not arise elsewhere; because, from its nature, namely, the careless

venue; and then point out the hardship to which the defendant would be exposed if the cause were tried in the county of *Somerset*, on account of certain witnesses living in the county of *Middlesex*.

1834.
PALMER
v.
TERRY.

PATTESON, J.—There are hardships on both sides. The plaintiff swears that his witnesses all reside in *Somersetshire*, and the defendant swears that all his witnesses reside in *Middlesex*. But the plaintiff has the choice, and therefore he is entitled to retain his venue in the county where he originally laid it. The defendant could have no right to remove the venue from *Somersetshire* to *Middlesex* on the affidavit he has made, for he does not swear that the cause of action did not arise elsewhere than in the county of *Middlesex*, nor could he. Therefore, without an affidavit on the part of the plaintiff, he would be entitled to retain his venue in *Somersetshire*, and without any undertaking to give material evidence in that county. The present rule must, therefore, be discharged; and, as it was an experiment, it must be discharged with costs.

Rule discharged, with costs.

DOE d. FOLKES v. ROE.

CHANNEL moved for judgment against the casual ejector. The service was perfectly regular on the tenant in possession on the premises, but, in the tenant's name in the notice, the name of "*Jacob*" was substituted for that of "*Sarah*."

If the service is regular, the substitution of "*Jacob*" for "*Sarah*" in the notice is immaterial.

PATTESON, J.—That is sufficient. You may take your rule.

Rule granted.

1834.

All affidavits
used in Court
must be filed.

Ex parte ELDERTON and LUCENA.

PLATT moved that Mr. *Pitt*, the gentleman so frequently before the Court in person, might be compelled to file certain affidavits which he had made in support of a motion by counsel, which contained several scandalous statements with respect to the gentlemen on whose behalf he moved. The application, though made, had not been granted; but, by applying to the Court, he had submitted to its jurisdiction; and therefore he was bound to observe the rules of the Court, one of which was, that all affidavits used in Court should be filed.

PATTESON, J.—You may take your rule.

Rule *nisi* granted.

SEALEY *v.* ROBERTSON.

Where an at-
torney has been
served with
process at cham-

BARSTOW moved to enlarge a rule to compute obtained in this case against the defendant, until the last day of term, and that the service of the enlarged rule

attorney, it would be unpleasant for him to be served at his office. Some negotiation took place, and the defendant was ultimately served at *Clarence Chambers*. The rule to compute was served at *Clarence Chambers*, on a woman servant there, who stated that the defendant had left there, and she did not know where he was gone.

PATTESON, J.—As he had left the chambers it was not likely he would receive it.

Barstow.—But by analogy to the course directed by 1 *Reg. Gen. H. T. 2 Will. 4*, c. 49 (a), it should seem that there was nothing unusual in the application; for by that rule it is ordered, that, “where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, though not without previous leave of the Court.” The writ here having been served at the place where it is now sought to serve the rule, it is submitted, that, by analogy to the service of notice of declaration, the present mode of service might be allowed. If the plaintiff, instead of referring the matter to the Master to compute, thought proper to execute a writ of inquiry, he would not be compelled, in such a case, to serve a notice. At least he might, if he chose, execute it, and sign final judgment at his peril, and the defendant would not be allowed to set it aside without an affidavit that he had not been served with process.

PATTESON, J.—I think, under the circumstances, you may have your rule enlarged until the last day of the term; and that the service of the rule be by leaving a copy at his last place of abode, and sticking up another in the *King’s Bench Office*.

Rule *nisi* accordingly.

On the last day of term the rule was made absolute, no cause being shewn.

Rule absolute.

(a) *Ante*, Vol. 1, p. 189.

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SEALEY
v.
ROBERTSON.

1834.

KING v. PACKWOOD.

Where a demand is made of money, pursuant to the Master's *allocatur*, by or under the authority of a power of attorney, a copy of the power must be left with the defendant in order to bring him into contempt for non-payment.

WHITE moved for a rule *nisi* for an attachment against an attorney for non-payment of a sum of 800*l.* pursuant to the Master's *allocatur*. His affidavit stated, that, at the time of demanding the money, which was by a third person, a copy of the rule and of the Master's *allocatur* were left, and the originals shewn; but no copy of the power of attorney was left, although the original was shewn. As a copy of it was not left, an objection was made in the office to draw up the rule. It must be unnecessary to leave a copy of the power of attorney, because it must be useless to the defendant. It would convey no information to him, which he could not obtain by merely seeing the original. It might, perhaps, be important to have a copy of the rule and of the Master's *allocatur*, in order to see whether there were any objections to which they were liable. But all that he could require, as far as the power of attorney was concerned, was to see that the proper person had demanded the money. That he could as well learn from a mere inspection of the power of attorney, as by having a copy left with him. He directed the learned Judge's attention to *Bass v. Maitland (a)*.

Kenyon, that it was necessary that a copy of the power of attorney should be left. He also cited *Laugher v. Laugher* (a), where the Court of *Exchequer* held that it was necessary a copy should be left, or an attachment would not be granted.

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KING
v.
PACKWOOD.

White, contra, distinguished the present case from that of *Laugher v. Laugher*. It was not necessary to decide this point in that case, for there the subscribing witness made no affidavit of the execution of the power of attorney, and therefore no attachment would have issued on that account. Mr. *Tidd* only mentioned the practice from a *dictum* of Lord *Kenyon*; but in what case, or under what circumstances, did not appear. In a note in the same page, he referred to *Longman v. Holmes* (b), and *Bass v. Maitland* (c), as throwing doubt on his proposition. The former of those cases it would be impossible to support at this day, it having been there considered unnecessary that the demand, when made by a third person, should be authorized by a regularly executed power of attorney. But the latter of them very nearly comes up to the point now in dispute. There cause was shewn, in the first instance, against an attachment upon an affidavit, that the power of attorney was not produced at the time of making the demand, whereas, on the other side, it was sworn to have been produced, together with the rule and the Master's *allocatur*. And the Lord Chief Justice, after adverting to those circumstances, concludes—"I am, therefore, of opinion that enough was done to entitle the plaintiff to his attachment."

PATTESON, J.—If the practice is to leave a copy of the power of attorney at the time of making the demand, I should be indisposed to break in on it. I understand from

(a) *Ante*, Vol. 1, p. 284.

(b) 2 Sir W. Black. 990.

(c) 8 J. B. Moore, 44.

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v.
PACKWOOD.

the clerk of the rules, that it is the invariable practice to leave a copy; and I can easily conceive why it may be desirable that a copy of the power of attorney should be left with the defendant, as an unlettered person might have some difficulty in making out the power of attorney on a mere momentary inspection. Mr. *Tidd* says, that it is necessary that a copy of the rule, *allocatur*, and power of attorney should be left with the defendant, and for this statement he refers to the opinion of Lord *Kenyon*, but he does not state under what circumstances that opinion was given. In the case of *Bass v. Maitland*, there seems to be some confusion in the report, and I am not satisfied that the objection was brought before the consideration of the Court. Upon the whole, therefore, it is better to hold that a copy of the power should be left in such a case. I disclaim making any distinction between the case of an attorney and that of any other person. The rule ought to be as general as possible. If it were merely shewn to the party, he would not have an opportunity of seeing whether it was legal or not; and, if it were merely shewn to an unlearned person, he would not be able to obtain legal advice as to whether it was a legal or an illegal demand. The present rule must, therefore, be discharged, but without costs, as the case of *Bass v. Mait*

faults in not proceeding to trial on two occasions should be paid. The lessor of the plaintiff was a person suing *in formâ pauperis*, and having made default on one occasion in proceeding to trial pursuant to his notice, the Court ordered him to pay the costs of the day. These costs were not paid, and the lessor of the plaintiff then proceeded to give a second notice of trial. The lessor again made default by withdrawing the record. The object of the application was, that he might be restrained from proceeding until the costs of those two former occasions were paid. A rule *nisi* was accordingly granted; and against it—

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d.
EVANS
v.
EDWARDS.

Kelly shewed cause.—With respect to the second default, his affidavit stated that the cause of it was the temporary absence of a registrar at the moment when the cause was called on. It became necessary, of course, to withdraw the record, and soon after the registrar returned. The next morning an application was made to the other side, for their consent to the restoration of the cause to the list. This, however, was refused. The default, therefore, was not to be attributed to the lessor of the plaintiff, but to an unforeseen accident. The lessor of the plaintiff was a pauper, and if the present rule were made absolute for compelling him to pay the costs consequent on the two defaults, or stay his proceedings until he did pay them, it would be the same as preventing him from enforcing his rights.

C. Austin contended, that, after the long-continued vexatious proceedings of the pauper, it was only just to the defendant that the payment of the two sets of costs mentioned in the rule should be made a condition precedent to his proceeding to trial.

PATTESON, J.—To make the payment of these costs a

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condition precedent, would be contrary to the rule on this subject. I can order you to have the costs of the day paid to you by the lessor of the plaintiff, and for them you have a remedy by attachment; but I cannot make them a condition precedent. The rule may be absolute, therefore, for the payment of the costs of the day, and discharged as to the stay of proceedings.

Rule absolute accordingly.

BARBER v. MITCHELL.

Although there is strong reason to believe that a *fi. fa.* had been issued in order to defraud the executors of a *bonâ fide* creditor, and that the sheriff is a party to the fraud, the Court will not interfere summarily to compel the sheriff

IN this case a rule was obtained by *R. Alexander*, calling on the sheriff to pay over the proceeds of a levy made by him on the goods of the defendant to the plaintiff in this cause. The facts were these:—The plaintiff issued a *fi. fa.* against the goods of the defendant, and that writ was placed in the hands of a sheriff's officer. He proceeded to the premises in the month of *June*. Having seized the goods, he was about to sell, when he received notice from the defendant that a previous *fi. fa.*, at the suit of a Mr.

hands at the suit of Mr. *Buller*; no directions had been given as to the steps to be taken on it; no directions that none should be taken on it; and the sheriff never ruled to return the writ. As soon as a second writ of *fi. fa.* made its appearance, he gave notice of a previous writ having issued at Mr. *Buller's* suit. These facts were no evidence of fraud or collusion, and, if they were, the Court would not decide on the question in this summary manner, but the plaintiff must be left to his action against the sheriff. The present rule, therefore, ought to be discharged, and with costs.

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BARBER
v.
MITCHELL.

R. Alexander, contra, admitted the novelty of the application, but urged that it formed no objection, and particularly as it had been distinctly intimated to the Court on moving for the rule. He also contended, that, from the circumstances detailed in the affidavits, there could be no doubt that the sheriff was colluding with the defendant, and, if he were so, the Court ought to interfere without driving the plaintiff to the circuitry and delay of an action. He cited the case of *Lovich v. Crowder and Another* (a). This was an action against the sheriff for a false return to a writ of *fi. fa.* In the month of *March*, the then sheriffs of *London* seized the goods of a debtor by virtue of a *fi. fa.* An officer was put in possession, but the execution creditor directed the sheriffs not to sell; and the debtor continued to have the control of his goods until the month of *November*, when another execution creditor sued out a *fi. fa.*, directed to the succeeding sheriffs of *London*. The Court there held that the latter were bound to levy under the second *fi. fa.*, and that it was their duty, when they found the officer of the former sheriffs in possession, to inquire into the facts; and if they had done so, they would have learned that the first exe-

(a) 2 Mann. & Ryl. 84; 8 B. & C. 132.

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cution was fraudulent. The present is a much stronger case than the one cited, for there the sheriff's officer remained in possession, and thereby asserted a title to the goods; whilst here no one either knew or suspected the existence of any *fi. fa.*, until a levy had been made on the goods at the instance of a *bonâ fide* creditor. In the case of *Lovich v. Crowder*, Lord *Tenterden* observed—"It seems to have been conceded at the trial that, if the same persons who filled the office of sheriff in *March*, when the first execution issued, had filled it in *November*, they would have been bound to levy; and, consequently, if the defendants had filled the office at that time, they would have been liable in this action. But it was said that the goods, having been seized by the former sheriffs when in custody of the law, could not, therefore, be seized by the defendants. It seems to me that they were not in the custody of the law at the time when the *fi. fa.* at the suit of the plaintiff was sued out; they were in custody of the sheriff's officer, by virtue of a legal process fraudulently kept on. The first *fi. fa.* was sued out returnable in *Easter Term*. The sheriff was never ruled to return the writ, and he made no return. *Harrison* (the defendant in that action) continued in possession, and carried on the bu-

rule was obtained, and the party here was left in possession of the goods himself, without any interference on the part of the previous execution creditor. That circumstance alone must have struck the sheriff as an indication of fraud; and, therefore, he ought to have disregarded the first writ, and levied under the second.

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PATTESON, J.—In that case the execution creditor had directed the sheriff not to sell. I suppose it was with a view to that fact that the previous execution creditor swears that he did not tell him not to sell; but they do not swear that they did desire him to sell.

Alexander.—It is the sheriff's duty to proceed with reasonable diligence upon all such process as comes regularly into his hands. When he does not so proceed, it must be presumed that his delay is the result of corresponding instructions from the party lodging the writ. If so, *Butler* must either directly or indirectly have intimated to the sheriff that the process must not actually be enforced; and the mode in which his affidavit attempts to insinuate rather than assert the contrary confirms the presumption.

PATTESON, J.—In an action against the sheriff it would be a question of fraud; and that would be for the jury.

Cur. adv. vult.

PATTESON, J.—I have looked into the cases, and it seems difficult for me to prevent the case from going to a jury. The circumstances are such that I think the party has a right to have the question tried, if he thinks fit. The question as to whether the judgment first obtained was fraudulent or not, could not be raised in an action against the sheriff. For that purpose, an issue must be directed. But I think, that the question, whether the

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sheriff was a party to the fraud may be tried in an action against him. If the first writ was left at the sheriff's office, as a protection to the defendant's goods, in case of a subsequent one coming to his hands, and the sheriff lent himself to the proceeding, on a return of *nulla bona* to the *fi. fa.* issued by the plaintiff, in this case, he would be liable to an action for a false return. The question, whether the first execution was fraudulent, with his knowledge, may be raised in an action against the sheriff. The case here is not so clearly fraudulent on his part as to authorize me in interfering; but I do not say that the Court would interfere, even if a clear case of fraud were made out; for I feel great difficulty in saying, that, even if it were quite clear that the sheriff was a party to the fraud, the Court would interfere. The present rule must, therefore, be discharged, but without costs.

Rule discharged, without costs.

LORD NUGENT v. HARCOURT.

A commissioner **D. POLLOCK** shewed cause against a rule obtained

second point, the plaintiff stood in the same situation as an officer in the army serving abroad, who was not required to find security for costs in such a case. He cited *O'Laughlin v. Macdonald* (a), where the Court of *Common Pleas* refused to make an *English* officer serving in *South America* find security for costs. In *Lee's Dictionary of Practice*, p. 1261, there were two cases, one of a prisoner at war, and another of an officer serving in the *British* army, to the same effect.

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W. H. Watson, *contra*, contended, that the Court could not take judicial notice of the plaintiff's peerage. It must appear by some regular medium of proof. He distinguished the present from the cases cited, as there the absence was involuntary, the prisoner at war as well as the officer in the army being compelled to reside abroad. Whereas it could not be said that the absence of Lord *Nugent* was involuntary in his present office, since the King could not compel him to leave the country. If the King could, he might, if he chose, exile any of his subjects. That, however, he could not do. There was no reason, therefore, for freeing Lord *Nugent* from his liability to give security for costs, like any other plaintiff who brought an action, he being permanently resident abroad. Some time ago, in the last term, Mr. Justice *Taunton* compelled a plaintiff to find security for costs, who intended to remain abroad for eighteen months. But here, there was no assignable limit to the period during which Lord *Nugent* would remain abroad.

PATTESON, J.—In the case of an officer in the army, the absence is certainly involuntary. But I think, if an *Englishman* is not permanently abroad, but is absent for temporary purposes in the service of his Majesty, he

(a) 3 J. B. Moore, 77; 8 Taunt. 736, S. C.

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stands in the same situation as if he were compulsorily abroad, and therefore ought not to be compelled to find security for costs. If he had gone abroad for his own convenience merely, it would have been different. I do not give this opinion on the ground of his being a peer, because that fact is not fully brought before the Court; but because he is abroad serving his Majesty, and also having a residence and property in this country. The present rule must, therefore, be discharged, and with costs.

Rule discharged, with costs.

DOE *d.* PROSSER *v.* KING.

If there is a dispute as to the inheritance, the Court will not compel the trustee of an outstanding term attending the inheritance to lend his name to either party in an action of ejectment.

C. CRESSWELL shewed cause against a rule for striking out the name of the lessor of the plaintiff from the declaration. Mr. *Prosser* was the trustee of an outstanding term attending the inheritance, and therefore, in order to maintain the ejectment, it was necessary that his name should be used. The person bringing the ejectment was willing to give him indemnity against costs, to the satisfaction of the Master. Mr. *Prosser* had refused to per-

ance, the trustee has a right to take which side he pleases, and neither party is entitled to come here and compel him to lend his name to either. Suppose a man to die, and there is a doubt as to who is heir, neither party could make him allow his name to be used for the purpose of an action of ejectment. It is not clear from the affidavits in this case, that there is a dispute as to the inheritance. The trustee merely says, he claims adversely, and that he means to defend the action. He should have stated more explicitly that he claims title to the inheritance. It must, therefore, be referred to the Master to ascertain whether there is any dispute as to who is heir; and not a mere dispute between landlord and tenant. If there is a dispute as to the inheritance, then the Court cannot interfere, and the rule must be made absolute; if there is not, then the present rule must be discharged. The costs to be in the Master's discretion.

Rule accordingly.

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 d.
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 v.
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—◆—
 REX v. COLLIER.

V. LEE moved to compound a penal action which had been instituted by the *Post Office*. It did not appear by his affidavit that the defendant had as yet pleaded.

On a motion to compound a penal action, it must appear that the defendant has pleaded.

PATTESON, J.—That will not do, as the statute of the 18 *Eliz.* c. 5, s. 3, requires that the compounding shall not be “but after answer made in Court.” You must have your affidavit amended in that particular. You will, therefore, take nothing by your motion.

Rule refused.

Dowling, *amicus curiæ*, mentioned another similar case, in which Mr. Justice *Parke* had pronounced a similar decision during last *Hilary Term* (a).

(a) See 1 *Tid. Pr.* 556, 9th ed.

1834.

ALLIER v. NEWTON.

A rule for an attachment for non-payment of costs may, under certain circumstances, be obtained without personal service.

CHANNELL moved for an attachment against a defendant for non-payment of costs, pursuant to the Master's *allocatur*, without personal service. He was aware that the practice had formerly been to require personal service of the *allocatur*, in order to obtain an attachment; but it had been lately decided by the Court of *Exchequer*, in the case of *Green v. Prosser* (a), that personal service was not necessary in all cases, in order to obtain an attachment. There, two bills, for business done by a person named *Miller*, as an attorney, were taxed by the Master, and he was found to have been overpaid 62*l.*, which he was requested to refund. The order for taxing was made a rule of Court, and an appointment made to serve *Miller* with it, but he did not attend. Several other attempts were made to serve him, but without success. It was further sworn that it was believed he kept out of the way to avoid being served. There it was objected that the attachment could not be granted without personal service; but Lord *Lyndhurst* there observed—"All these cases depend upon their own particular circumstances." The Court took time to consider, and his Lordship subsequently said, "That

asked what he wanted. The deponent said he wanted to see his son, and the father answered, "then you shall not have him." The deponent then went to the side of the house, and there saw the defendant in the shop at work, with his back towards deponent. He then went into the shop, when the father called out, "*Tom, fly!*" The defendant then rushed out of the shop into the kitchen. The deponent attempted to follow him; but a female there shut the door in his face. The father then said—"I have done thee a second time; the bird has flown." The circumstances in this case were clearly stronger than those in the *Exchequer*; and, therefore, if that Court would grant an attachment in that case without personal service, there was no reason why it should not be granted in the present.

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PATTESON, J.—On the authority of the case you have cited, you may take your rule. I am afraid, however, it is a very dangerous precedent; as now it will be necessary to look into the special circumstances of every case, until, at last, any sort of service will suffice. You may take a rule to shew cause; and the service of the rule must be at the defendant's residence.

Rule *nisi* granted.

ANOTHER rule for an attachment was obtained by *V. Lee*, under similar circumstances, during the same day.

BIRD'S Bail.

W. CLARKSON opposed bail, on the ground that one of them had been changed without leave of the Court or a Judge, contrary to 5 *Reg. Gen. H. T. 1 Will. 4 (a)*.

The rule of 5 *Reg. Gen. T. T. 1 Will. 4*, as to changing bail, does not apply to the case of a prisoner.

(a) *Ante*, Vol. 1, p. 103.

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 Bird's Bail.

Heaton, in support of the bail.—The present is the case of a prisoner, and that rule does not apply to such a case.

PATTESON, J., after consulting the clerk of the rules (Mr. *Aulesbrook*).—The case of a prisoner is not within that rule. Bail may be changed there without leave.

Bail passed.

DU PRÉ *v.* LANGRIDGE.

The date of the writ need not be stated in the declaration, notwithstanding the pleading rules of *H. T.* 4 *Will.* 4.

DOWLING moved to set aside a declaration for irregularity, on the ground of the date of the writ being omitted at its commencement. He referred to the form of the issue given at the end of the pleading rules of *H. T.* 4 *Will.* 4 (a), in which appeared the date of the writ. Now, the issue being formed from the pleadings in the cause, and it stating the date of the writ, it must be concluded that in the declaration itself the date of the writ ought to be stated.

PATTESON, J.—It was not the intention of the Judges when they gave that form to make any alteration in the

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STRATTON v. REGAN.

DOWLING moved for a rule to shew cause why the judgment of *nonpros* and the notice of taxation should not be set aside, on the ground of the judgment having been signed against good faith, with a stay of proceedings in the meantime.

In the *King's Bench* a rule *nisi* for setting aside proceedings for irregularity may be drawn up with a stay of proceedings, although notice of motion has not been given.

PATTESON, J., granted the rule *nisi*.

Dowling stated that he had no affidavit of notice of this motion having been given. There was a difficulty as to whether the rule could be drawn up with a stay of proceedings, on account of a decision pronounced by Mr. Justice *Parke* in the case of *Fortescue v. Jones (a)*. In that case his Lordship decided, that, unless notice of the motion had been given, the rule could not be drawn up with a stay of proceedings. He had, however, understood that the practice was different in this Court from that which his Lordship had decided; and that, in accordance with that different practice, Mr. Justice *Taunton* had decided in the previous *Easter Term*.

PATTESON, J., referred to the clerk of the rules (Mr. *Aulesbrook*), and he reported that the practice was in the Court of *King's Bench* in conformity with the decision of Mr. Justice *Taunton*. His Lordship then directed that the rule *nisi* should be drawn up with a stay of proceedings, although no notice of motion had been given to the opposite party.

Rule *nisi* accordingly.

(a) *Ante*, Vol. 1, p. 524.

1834.

FOSTER'S Bail.

The objection to a notice of bail, that the number of the street is not stated, must be taken in the first instance, and it is waived by obtaining time to inquire, unless it is sworn that the bail's residence cannot be found.

J. L. ADOLPHUS opposed bail, on the ground that the number of the house in which the bail lived was not given in the notice, according to the directions of 2 *Reg. Gen. T. T.* 1 *Will.* 4 (a). When the bail came up originally, the objection was not taken, but time was obtained, in order to make inquiries with respect to them. Inquiries were made, but no affidavit was now produced that the person inquiring had been unable to find the bail. Although the objection had not been taken when they first came up to justify, it was contended, that, as the omission of the number of the house was contrary to the express directions of a rule of Court, it was not too late to take the objection now.

PATTERSON, J.—The rule is certainly express, that the number, if any, is to be stated in the notice. But the objection would appear on the face of the notice, and, therefore, ought to have been taken when they first came up for the purpose of justifying. You having taken time to inquire with respect to them, have waived the objection,

unless you produce an affidavit that you cannot find

1834.

FOSSETT v. GODFREY.

BUSBY shewed cause against a rule *nisi*, obtained by **Mansel**, under the 23 *Geo. 2*, c. 33, s. 19, (the *Middlesex* County Court Act), for entering a suggestion to grant the defendant double costs, the plaintiff having recovered upon a writ of trial a sum less than 40*s.*, viz. 9*s.* As a preliminary objection, he contended that the defendant by his affidavit had not brought himself within the meaning of the act, and therefore was not entitled to receive his double costs. The words of the act were, "that in case any action of debt or action upon *assumpsit* shall be commenced and prosecuted in any of his Majesty's Courts of Record at *Westminster*, and the defendant or defendants at the time of such action brought shall live and reside in the said county of *Middlesex*, and be liable to be summoned to the said County Court, &c." In order, therefore, to entitle the defendant to avail himself of this act, it must appear by the affidavit that he is liable to be summoned to the County Court of *Middlesex*. The affidavit, however, on which the rule had been obtained, merely stated that the defendant was resident in the county of *Middlesex*, without going on to state that he was liable to be summoned to the County Court. Not having brought himself within the words of the act of Parliament, he was not entitled to avail himself of it. The present rule must, therefore, be *disharged* (a).

In an affidavit supporting an application for double costs under the 23 *Geo. 2*, c. 33, s. 19, (the *Middlesex* County Court Act), it must be stated that the defendant is liable to be summoned to the County Court.

Mansel, *contra*, contended, that the affidavit did sufficiently shew that the defendant was liable to be summoned to the County Court of *Middlesex*.

PATTESON, J.—It appears to me that it is not shewn by the affidavit that the defendant is liable to be summoned.

(a) See *Unwin v. King*, *ante*, p. 492.

1834.

FOSSETT
v.
GODFREY.

Unless it does so appear, the defendant cannot avail himself of this act. The present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

JOHNSON v. SMALLWOOD.

If a defendant seeks to set aside proceedings on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause.

CHANNELL shewed cause against a rule *nisi* obtained by *Mansel*, for setting aside the appearance entered by the plaintiff for the defendant, the declaration, and all subsequent proceedings, on the ground that the defendant had not been served with a writ. He objected in the first place to the affidavit on which the present application was founded, as it appeared from it that the person making it was a stranger to the proceeding. The person making the affidavit described himself as "*George Smallwood, of Hammersmith, Middlesex*," but did not state himself to be the defendant, in this action. The affidavit then proceeded to state that the said *George Smallwood* had never been served with any process. If he was not the defendant in the action, what occasion was there for him to come

proceedings. For any thing that appears it might be some one else who bore the same name as the defendant. The present rule must therefore be discharged, but without costs.

1834.
JOHNSON
v.
SMALLWOOD.

Rule discharged, without costs.

METCALF v. PARRY.

HUMFREY moved for a rule *nisi*, requiring the sheriff of *Warwickshire* to shew cause why he should not pay the costs consequent to the plaintiff, on the refusal by the under-sheriff to produce to the plaintiff his notes taken on the trial of an issue before him. A motion had been made to the Court above with respect to the trial of the issue, and it was intimated to the under-sheriff that the Court was desirous of having his notes taken at the time of the trial. These, however, he refused to produce, stating that he would not produce them until an official order of the Court was made upon him for that purpose. Such an order was afterwards obtained, and the notes ultimately produced. Before this, however, took place, considerable expense had been incurred by the plaintiff. The object of the present application, therefore, was, that the sheriff might be required to pay the expenses so incurred, and that the service of the rule might be effected on the agents of the under-sheriff.

If an under-sheriff refuses to transmit his notes taken on the trial of an issue, the Court will compel him to pay the costs consequent on his refusal.

PATTESON, J.—You may take the rule in that form.

Rule *nisi* accordingly.

On the last day of term the rule was made absolute; no cause being shewn.

1834.

FREAM *v.* BEST.

In order to obtain the costs of justifying bail, an application should be made at the time of justification.

BUSBY applied for the costs of justifying bail who had complied with the provisions of the *3 Reg. Gen. T. T. 1 Will. 4 (a)*. The words of the rule are, "that if the notice of bail shall be accompanied by an affidavit of each of the bail according to the form hereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification." The bail having been allowed, the defendant was entitled, as a matter of course, to the costs of justification. At the time of justifying, however, application was not made for those costs, and the rule for the allowance was drawn up without noticing them. The object of the present application, therefore, is, that, although it is some days since the bail justified, and no application at the time was made for the costs, the Court will still grant them.

PATTESON, J.—It would appear to me, from the language of the rule, in the subsequent part of it, that the defendant is entitled to his costs of justification, as a matter of course. For the rule goes on to say, "if such bail

have appeared for the purpose of resisting an application for costs, and hearing none, and relying on the practice generally adopted, may have gone away; and therefore I could not with propriety entertain such an application in their absence.

1834.

FREAM
v.
BEST.

Motion refused.

BALDWIN and Another, Executors of THOMSON, v.
ATKINS.

EVANS moved to enter up judgment on an old warrant of attorney. The peculiarity in the case was, that, although the warrant of attorney authorized the entering up of judgment at the suit of *Thompson*, his "executors or administrators," the affidavit of the execution made no mention of "executors or administrators." As, however, the rule was drawn up on reading the warrant of attorney as well as the affidavit of execution, the defect might be considered as cured.

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of "executors or administrators," the Court will not allow judgment to be entered up.

PATTESON, J.—I think not; because the affidavit may refer to some warrant of attorney where the words "executors or administrators" are not introduced. I cannot, therefore, grant the rule.

Rule refused.

CONSTABLE and Another v. FOTHERGILL.

PETERSDORFF obtained a rule *nisi*, requiring the plaintiff to shew cause why the writ of *ca. sa.* in this case should not be set aside for irregularity, and the defendant discharged out of custody, on the ground that there was no indorsement on the writ of the defendant's addition and place of abode, pursuant to the directions of *H. T. 2 & 3 Geo. 4. K. B.*, which directs that the place of

After the lapse of two terms, the Court will not discharge a defendant out of custody on the ground that his addition and place of abode are not indorsed upon the writ of *ca. sa.*

1834.

CONSTABLE
v.
FOTHERGILE.

abode and addition, or other description of the defendant, shall be indorsed.

George shewed cause against this rule; and contended, that the omission was immaterial, as the words of the rule are not imperative, and only require the plaintiff to give the best particulars and description of the defendant's addition and residence that he can, and that the rule was made for the benefit of the sheriff and not for that of the defendant. He also contended that the application was too late, the defendant having been in custody under the writ since *Michaelmas* term last.

Petersdorff, in support of the rule, contended that no cognizance of the facts could justify the absolute omission of the defendant's addition and place of abode; and that, as the defendant was a prisoner, no lapse of time could operate to his prejudice, or prevent him from availing himself of an irregularity; and that the rule of Court was not made as supposed for the benefit of the sheriff, but in order to identify the defendant with the proceedings in their different stages.

PATTESON, J.—I do not adopt the argument that the

1834.

UNWIN v. KING.

PLATT shewed cause against a rule *nisi*, which called upon the plaintiff to shew cause why, on payment of 1*l.* 10*s.*, judgment and all proceedings on it should not be set aside, and why he should not be restrained from issuing execution for the sum of 1*l.* 10*s.* which he had recovered in this action, and the costs thereof. The ground of the application was, that the defendant was liable to be sued in the *Middlesex* County Court. This action had originally been brought for the recovery of 5*l.* in this Court, and the plaintiff only recovered a sum of 1*l.* 10*s.* in consequence of his admitting a counterclaim on the part of the defendant to the amount of 3*l.* 10*s.* An application was made to give the defendant double costs under the County Court Act of *Middlesex*, on the ground that the plaintiff had recovered less than 40*s.* That rule was discharged by Mr. Justice *Taunton* (a), on the ground that it did not appear from the affidavit made by the defendant that he was liable to be summoned to the *Middlesex* County Court. As of course the defendant could not make a second application in the same form for the same purpose, he had obtained this rule, which was different in form, but which had nearly the same object, namely, to prevent the plaintiff from obtaining his costs on account of his verdict. The defendant could not obtain the object of his application in this form. If he were entitled to it at all, it must be by motion for leave to enter a suggestion to deprive the plaintiff of his costs. He had proceeded by suggestion already, and had failed in his application. He was therefore not entitled to restrain the plaintiff in any way from proceeding in his judgment. The present rule must therefore be discharged.

In order to deprive a plaintiff of his costs, under the *Middlesex* County Court Act, the application must be made before final judgment.

Mr. *King*, (in person), contended that the description

(a) *Ante*, p. 452.

1831.

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v.
KING.

given in the affidavit was sufficient; and, with respect to the form of the application, it was framed in accordance with the case of *Fleming v. Davis and Others* (a), in which the circumstances were, that the plaintiff sued the defendants in the Court of *King's Bench* for a demand exceeding 5*l.*; and upon judgment by default the jury assessed the damages at 5*l.* only. At the time of the action brought, the defendants resided within the jurisdiction of the *London Court of Requests*, and might have been sued under the 39 & 40 *Geo. 3*, c. 104; and the Court there stayed proceedings on payment of the damages, without costs. The present application was founded on that case; and therefore, as the Court had interfered in one instance, there was no reason why it should not interfere in a similar one.

Cur. adv. vult.

PATTESON, J.—I do not think the Court can make the rule absolute in its present form. It appears that here final judgment was signed after the former rule was discharged, and before this was made. The course is, where final judgment has not been signed, to apply to enter a suggestion to deprive the party of costs, as it cannot be entered afterwards. That suggestion the plaintiff

ed on the record, they had a right to have it. I can find no instance where the suggestion has been entered after final judgment; and in *Calvert v. Everard* (a), Mr. Justice Bayley said, that it could only be entered before final judgment. The present rule must therefore be discharged without costs.

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UNWIN
v.
KING.

Rule discharged without costs.

(a) 5 M. & Sel. 510.

MASON v. REDSHAW.

(Before the four Judges.)

TYRWHITT had obtained a rule on behalf of the sheriff of *Derbyshire*, under the Interpleader Act, calling on the plaintiff *Mason* and one *William Redshaw* to come forward and state their claims.

Where the sheriff obtains a rule for relief under the Interpleader Act, the claimants may appear without taking office copies of the affidavits on which the rule was obtained.

Greaves appeared for *William Redshaw*.

R. V. Richards objected to his being heard, as he had not taken out office copies of the affidavits filed in support of the motion.

Per Curiam, (DENMAN, C. J., LITLEDAL, TAUNTON, and WILLIAMS, Js.)—That is unnecessary; such affidavits are only required for the purpose of shewing to the Court that there is ground for their interfering on behalf of the sheriff. The claimant does not come here to answer those affidavits, but to substantiate his own claim.

The facts were then mentioned, and an issue directed to try the property in the goods seized.

Rule accordingly.

1834.

DOYLE v. ANDERSON.

If an insolvent debtor proceeds with an action after executing his assignment, although no assignees are appointed, the Court will compel him to find security for costs.

KELLY shewed cause against a rule *nisi* obtained by **Maule**, requiring the plaintiff to shew cause why the proceedings in this action should not be stayed, on the ground of the plaintiff's insolvency. The facts, as they appear on the affidavits, are these:—The plaintiff some time since brought an action against the defendant, who is an underwriter, on a policy of insurance effected by him. Some time previously, he brought an action against another underwriter on the same policy, and therein was unsuccessful. Being greatly reduced in circumstances, he determined to take the benefit of the Insolvent Act, and accordingly gave notice of his intention so to do to the attorney in the former action. He filed his petition and schedule in the Insolvent Court, and executed his assignment, but no provisional assignee was yet appointed. The time for his hearing, however, was directed. It so happened, that the attorney for the defendant in the former action was the attorney for the defendant in the present. On receiving notice of the plaintiff's intention, the present application was made to compel the plaintiff to stay his proceedings until security for costs was found.

non constat that any assignee will be appointed. In *Snow v. Townsend* (a), the plaintiff had been discharged out of prison under the Insolvent Act, and had under that act assigned to the person who sued him all his property. Many persons were indebted to him before his assignment, and his assignee refusing to sue them, he had commenced an action against one of his debtors. There, the Court observed, that the principle on which security for costs was required was, that where a plaintiff was suing for the benefit of his assignees, they ought not to be permitted, if the plaintiff were unsuccessful, to shelter themselves from costs behind the plaintiff's poverty. Here it could not be said, that any assignee was sheltering himself behind the plaintiff's poverty, when it did not appear that any assignee was in existence. Again, in an *Anonymous case* (b), the Court refused to compel security for costs on the ground that the plaintiff was a bankrupt, or even in *Newgate*. If the Court were to decide, that the plaintiff in this case must find security for costs before he could proceed with his action, it would in fact be granting the defendant a complete immunity against the plaintiff's claim, until either he or some assignee hereafter to be chosen should give security for costs. Such a course the Court would certainly not sanction, and therefore the present rule must be discharged.

Maule, contra, contended that the plaintiff, in the present case, must be considered as a mere shadow, and put forward, therefore, only for the benefit of the insolvent's estate. He cited *Heaford v. M'Knight* (c). There an application similar to the present was made. The facts there were, that issue being joined in *Hilary Term*, 1822, the plaintiff gave notice of trial for the adjourned Sittings after

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(a) 6 Taunt. 123.

(b) 2 Taunt. 61.

(c) 4 D. & R. 81; 2 B. & C. 579, S. C.

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that term, but afterwards countermanded the notice. On the 13th of *May* following, he was discharged under the Insolvent Debtors' Act, (1 *Geo.* 4, c. 119), having inserted in his schedule the debt in question as being due to him from the defendant, and having executed the usual assignment of all his estate and effects to the provisional assignee as required by the Insolvent Act. Notwithstanding this, the plaintiff proceeded in his action, and, on the 15th of *January*, gave a second notice of trial; and the defendant swearing that he had a good defence upon the merits, the Court granted a rule *nisi* for security for costs. There the Court observed:—"We think this is a case in which security for costs ought to be given. The plaintiff having executed an assignment to the provisional assignee of all his estate and effects, he no longer has a right personally to interfere in recovering this debt; and being insolvent, if he should fail in the action, the defendant would have no remedy for his costs. We think that the plaintiff's assignee, and, if none has been chosen, some of his creditors, should give security for costs before the action ought to proceed."

PATTESON, J.—I do not know how to distinguish that

1834.

ALLPORT v. BALDWIN.

THIS was an action for a libel published by defendant in the *Worcester Herald*. Venue in *London*. Defendant pleaded—*first*, the general issue; *secondly*, several justifications. The cause was appointed to be tried by a special jury on *Thursday*, 20th *February*, 1834, for which day all the plaintiff's witnesses were subpoenaed, and about twenty of them resided in *Worcestershire*. On *Monday*, the 17th, at 11 A. M., the defendant obtained and served a Judge's order to withdraw all his *special* pleas, leaving the general issue only on the record. The greater part of the plaintiff's witnesses were subpoenaed to rebut the defendant's justifications. Those residing in *town*, and intended to have been so used, were countermanded by the plaintiff's attorney, who also resided in *London*; but he made no attempt to prevent the attendance of the *country* witnesses, thinking, that as they would all start on the *Tuesday* for *town*, there would not have been sufficient time for that purpose, although he might have written to the whole by the post on *Monday*. The jury found a verdict for the plaintiff.

If, by an alteration in the state of the pleadings, after notice of trial, certain witnesses are unnecessary, the party who subpoenaed them must make reasonable efforts to prevent their attendance, or their expenses will not be allowed on taxation.

On the taxation of costs the plaintiff's attorney claimed the expenses of the *country* witnesses, all of whom came up. To this the defendant's attorney objected, and contended that the plaintiff's attorney might have stopped them, had he written to them by *Monday's* post.

The Master (*Goodrich*) thought letters should have been written; but, to raise the question, he allowed the expenses of all the witnesses who attended.

A rule *nisi* to review this taxation having been obtained by *Godson*, and cause shewn—

PATTESON, J., thought letters should have been written; and that the costs of such of the witnesses as might

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have received their letters in time to prevent their departure should be disallowed.

Rule absolute.

BRAZIER v. BRYANT.

The Court will not interfere summarily to try the question of negligence on the part of an attorney towards his client's interests.



IN this case a rule *nisi* was obtained for an attachment for non-payment by *Brazier* of a sum of money, pursuant to the Master's *allocatur*. On shewing cause the following facts appeared:—Messrs. *Clutton & Carter* were employed as attorneys by *Brazier*; and, in the course of that employment, a matter in which he was concerned was referred by the Court of *Common Pleas* to an arbitrator. On taking up the award, the arbitrator's fee amounted to 87*l.*, the money for which was found by *Brazier*, and paid by Messrs. *Clutton & Carter*. The award was in favour of *Brazier*; and, on taxation of costs against the adverse party, an application was made to the *Common Pleas* to reduce the amount of the arbitrator's fees. That Court accordingly referred the matter to their officer, and he reduced the amount from 87*l.* to 35*l.*, and ordered the referee to refund; but the difference of 52*l.* was never repaid. The bills of Messrs. *Clutton & Carter*, between

PATTESON, J.—I cannot allow this sum to be set off against costs, as that would in fact be trying the question of negligence on the part of the attornies. But they have a right to have it tried by a jury.

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BRYANT.

Rule discharged.

GRAY and Others v. KIRBY.

UPON a motion for reading the Master's report, the following facts appeared:—Mr. *James Upton*, who resided at *Tadcaster*, was concerned for the plaintiffs as their solicitor, in a certain *Chancery* suit, mentioned in bills delivered to his clients from 1816 until 1823, when he became bankrupt. Mr. *Upton's* son, Mr. *George Upton*, then became solicitor for the plaintiffs in the *Chancery* suit, and acted for them till his father obtained his certificate. Mr. *James Upton* got his certificate in 1824, when he resumed his practice, and continued to act as solicitor to the plaintiffs till *October*, 1828, when he retired from the profession. During a portion of Mr. *James Upton's* employment by the plaintiffs, a Mr. *Robert Lys* was his *London* agent, and during the residue of that employment the same Mr. *Lys*, in conjunction with his partner, a Mr. *Thomas Lys*, conducted, as agent, the *Chancery* suit in question. After Mr. *James Upton's* retirement, his son Mr. *George Upton*, in conjunction with a Mr. *Thompson*, his partner, became concerned for the plaintiffs in the *Chancery* suit; Messrs. *Lys* acting also as their *London* agents therein. In the course of *James Upton's* employment, the plaintiffs advanced him 1079*l.* 13*s.*, of which 450*l.* was an advance in respect of the *Chancery* suit only. At the time *James Upton* became bankrupt, he owed *Robert Lys* 459*l.* 14*s.* 4*d.* on a promissory note, for general agency business. *Lys* proved his debt, and signed *Upton's* certificate, but

If a *London* agent receives money improperly, the remedy of the client is not against him, but against his attorney.

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received no dividend. Mr. *Upton*, after he had resumed his employment, remitted *Lys*, at various times between 1825 and 1829, to the amount of 283*l.* on account of that debt, he (*Upton*) being desirous of paying 20*s.* in the pound on all his debts, should his estate be sufficient, but without intending to revive such debt in law. Robert *Lys* received 543*l.* 8*s.* 1*d.* from the accountant-general in August, 1830, at which time James *Upton* stood indebted to him for the balance of principal and interest on the bankruptcy debt, and for general agency business done by himself and by himself and partner, Thomas *Lys*, up to October, 1828, in the sum of 388*l.* 16*s.* 1*d.*, the bills for which had been regularly sent to *Upton*. It should, however, be observed that *Lys* never brought forward the balance of the bankruptcy debt in any of those bills; but after he had got the money from the accountant-general in 1830, he sent *Upton* a general cash account, giving him credit on one side for the whole of the 543*l.* 8*s.* 1*d.*, and on the other side charging him with the bankruptcy and other balances, up to October, 1828, above referred to, but such accounts shewing, after all, a considerable balance in *Upton's* favour. But *Lys* admits that he received the 543*l.* 8*s.* 1*d.* as the agent of the several solicitors, and he says that they were entitled to credit for the same, as follows:—

Here of the costs £ s. d.

The several bills of costs of *James Upton* against his clients, up to *October* 1828, were taxed at 1034*l.* 15*s.* 8*d.*, and that sum being deducted from the 1079*l.* 13*s.* 0*d.* received on account, left a balance in favour of the clients of 44*l.* 17*s.* 4*d.* only.

On the part of the clients, it was contended before Master *Le Blanc*, who taxed the bills, that, as they contained the whole of *Upton's* charges in the *Chancery* suit, they were entitled to credit from him for the 435*l.* 11*s.* 11*d.*, so received by his agents, Messrs. *Lys*, as his (*Upton's*) share of the costs of such suit as before mentioned; and that, although *Upton* had relinquished his employment of solicitor in the cause long before those costs were awarded by the Court, yet in this respect, he was still answerable to his clients, there being no privity whatever between them and Messrs. *Lys*, or either of them. And, as a further argument, to shew that *Upton* was alone liable, it was contended that Messrs. *Lys*, as between themselves and *Upton*, had a lien on the money received, not only to the extent of their bill in the suit in question, but also for their general balance.

On the other hand, it was insisted on the part of Mr. *Upton*, that, immediately on his retirement, his agents, Messrs. *Lys*, became not only the agents of his successors, *Upton & Thompson*, but also the agents of his clients the plaintiffs, and, consequently, that they (Messrs. *Lys*) received the costs in question in the latter character. It was also insisted, that the right to receive the money was vested in the clients, and not in Mr. *Upton*, the clients having advanced him more than the 435*l.* 11*s.* 11*d.* on account of their *Chancery* suit only; and that, had *Upton* applied to the Court in respect of any lien upon the fund, the clients would have had a complete answer by shewing such overpayment. With regard to any lien which Messrs. *Lys* might have claimed in respect of the fund as between themselves and *Upton*, it was contended that

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the same could not possibly extend farther than their costs in the suit in question. But admitting such lien to extend to Messrs. *Lys*' general balance, the bankruptcy debt of *Robert Lys* could not possibly be revived to the prejudice of the clients, and consequently, that, as between Messrs. *Lys* and the clients, nothing would be due, such bankruptcy debt having exceeded in amount the 435*l.* 11*s.* 11*d.* For these reasons, it was contended, therefore, that the 435*l.* 11*s.* 11*d.* must be deemed to have been received by Messrs. *Lys* in their character of agents to the clients in the suit, and not as agents to *Upton*, who had retired from the suit so long previously.

Upton, notwithstanding he had so retired from the suit, furnished Messrs. *Lys* with a draft of his own bill of costs, to enable them to make out the clients' bills of costs for taxation, but gave them no directions as to their receiving the money from the accountant-general when payable. He, however, told one of his clients in 1829, which was after his retirement, that when those costs were received, he would account for them, and pay over the balance, if any. When he heard from Messrs. *Lys* that the costs had been received, he informed his clients of the fact; and considering that he had been already paid all that was due to him by his clients, he advised an application by them to Messrs. *Lys* to pay over the money to *Upton*. The clients made that application, and *Upton* threatened with proceedings, to recover the costs on the

notice to the contrary, and in this case no such notice was given either by *Upton* or his clients.

Under all these circumstances, Master *Le Blanc* was of opinion that the 435*l.* 11*s.* 11*d.* was in point of law received by Messrs. *Lys* in their original character of agents to Mr. *James Upton*, and, consequently, that he Mr. *Upton* was alone answerable to his clients, notwithstanding his previous retirement from the cause. On a review of all the accounts, the Master's *allocatur* was ultimately for the sum of 480*l.* 9*s.* 3*d.* in favour of the plaintiffs. A demand of this sum was afterwards made on *Upton*, but he refused to pay. A rule *nisi* for an attachment for non-payment was obtained against him, and, at the same time, a rule *nisi* by *Upton* for referring the matter back to the Master. Both rules afterwards came on to be heard, and they were both referred by consent to Master *Goodrich*, with directions to him to give credit to *Upton* for the sum of 274*l.* 7*s.* 1*d.* for bankruptcy business done by him, with power to direct whether a writ of attachment should issue, and for what sum, without a fresh application to the Court. Master *Goodrich* heard the case from beginning to end, and he was ultimately of opinion that Master *Le Blanc* was correct in the view he had taken. As, however, the point was one of some nicety, he was desirous that the opinion of the Court should be taken on it.

The *Attorney-General* and *Dundas*, on the part of *Upton*, contended that the view which both Masters had taken of the case was incorrect. The plaintiffs were entitled to receive credit for 435*l.* 11*s.* 11*d.*, part of the 543*l.* 8*s.* 1*d.*, which had been paid into the hands of *Lys* by the accountant-general, but not from Mr. *Upton*; that sum was received by his *London* agents without his authority, and therefore he ought not to be charged with it. The receipt of the agents could not charge him; and

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therefore, if they received this money, they, and not Mr. *Upton*, must be liable to the clients to whom it belonged.

Tomlinson, contra.—The money here was received by Messrs. *Lys* as the agents of Mr. *Upton*. It having come into their hands in that character, the clients had a right to look to Mr. *Upton*, the country attorney, for an account of that sum. This was like any ordinary case between a country attorney and his town agent. If the town agent was guilty of negligence, the client must bring his action against the country attorney. In the same manner, if the client's money were improperly received by the agent, the country attorney was liable to his client for that money.

PATTESON, J., (after recapitulating the facts of the case). —I think this money must be taken to have been received by Messrs. *Lys* as the agents of *Upton*. If so, as there is no privity between them and the plaintiffs, Mr. *Upton* is the person liable for the money so received by them. The Master's reports must therefore be confirmed. An attachment therefore will issue, but for the sum of 206*l.* 2*s.* 2*d.* only, credit being directed by the last rule to be

1834.

DOE *d.* HARRIS *v.* ROE.

KELLY moved for judgment against the casual ejector. The service had been by leaving the declaration with the turnkey of the prison in which the tenant in possession was confined, with directions to him to give it to him; and the tenant had acknowledged that he had received it before the first day of the term.

Service in ejectment.

PATTESON, J.—That will do.

Rule granted.

Ex parte SMITH.

J. J. WILLIAMS moved to re-admit an attorney. The only peculiarity in the case was, that the names of the deponents were omitted in the jurat.

Where the names of the deponents are omitted in the jurat through the inadvertence of the Judge's clerk, it will be amended by direction of the Judge.

PATTESON, J.—As that appears to be only an omission of my clerk, let a new jurat be written, and I will sign it.

Ex parte WENTWORTH.

DOWLING moved to re-admit an attorney. In his affidavit, the attorney did not swear that he had been admitted an attorney; but he swore, that, previous to the year 1827, he had been a practising attorney, and had taken out his certificate regularly till the year 1830. That he submitted was sufficient, as the attorney might be indicted for perjury on his statement, if he had not been admitted as an attorney.

On applying to re-admit an attorney, it is sufficient if the affidavit clearly shews by its statements that he must have been admitted, without positively stating the fact.

PATTESON, J.—I think he might be so indicted, and therefore that will do.

Admitted.

1834.

BORER v. BAKER.

(Before the four Judges.)

If a trial takes place in vacation, and the defendant surrenders after it, and before the following term, he ought to be charged in execution in that term, or he will be supersedeable under 1 *Reg. Gen. H. T. 2 Will. 4*, s. 85.

PLATT shewed cause against a rule *nisi* obtained by *Mansel* for discharging the defendant out of the custody of the marshal, on the ground that he had not been charged in execution within two terms after the trial, pursuant to the directions of 1 *Reg. Gen. H. T. 2 Will. 4*, s. 85 (a). The words of the rule are, "The plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." The facts were, that the trial had taken place in *Hilary* vacation, and a few days after, and before the first day of *Easter* Term, he rendered in discharge of his bail. The plaintiff, however, did not charge him in execution during *Easter* Term. The present application was founded on the objection, that the defendant ought to have been charged in execution during *Easter* Term. This, he contended, was unnecessary, as the rule on which the present application was founded applied only to executions in which the defendant was a prisoner at the time of the trial, whereas he was at large when the trial took place. But the vacation of *Hilary* Term being in cus-

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BORER
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defendant was charged in execution in *Michaelmas* Term. It was there moved to discharge the defendant out of custody, on the alleged ground that the plaintiff ought to have proceeded to final judgment in *Easter* Term, and charged him in execution in the *Trinity* Term following; but the Court there said, "There is no colour for granting the motion, for the defendant did not render himself until after the trial; and though the plaintiff might have signed final judgment in *Easter* Term, yet he might have good reason for not doing it." Again, in *Smith v. Jefferys* (a), the defendant surrendered in discharge of his bail in *Hilary* vacation, after verdict. Final judgment was signed in *Easter* Term, and the defendant charged in execution in *Trinity* Term. He having been discharged out of custody by Mr. Justice *Lawrence*, on the ground that he ought to have been charged in execution in *Easter* Term, a rule was allowed to quash the *supersedeas*, and to allow the plaintiff to issue out a *ca. sa.* After cause had been shewn against this rule, Mr. Justice *Lawrence* said that he had made the order for superseding the defendant out of custody, understanding that a surrender in the vacation was considered as a surrender of the preceding term; that that was the rule in other cases in respect to declaring against prisoners, and charging them in execution when the surrender is in the vacation after judgment signed; but that, on inquiry, he had found, that though the words of the rule *Hilary*, 26 *Geo.* 3, were general, applying as well to a surrender after verdict as after judgment, a distinction had obtained in practice between those two cases; and that, though, when the defendant surrenders in the vacation after final judgment, the term in which judgment is signed is reckoned as one of the terms in which the plaintiff must charge him in execution, the case was different where the defendant surrenders in the vacation after verdict; there the preceding term is not reckoned as one

(a) 6 T. R. 776.

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BAKER.

of the two terms. That this distinction also prevailed in the *Common Pleas*; and, therefore, he thought that the defendant ought not to have been superseded in this case. From the construction here given by the Court to the rule on which the application in that case was founded, it was clear that the term previous to the surrender of the defendant ought not to be considered as one of the terms within which the defendant ought to have been charged in execution.

Mansel, *contra*, distinguished this case from the cases cited, as the words of the rule on which they were founded were different from those of 1 *Reg. Gen. H. T.* 2 *Will.* 4, s. 85. The words of the rule of *H. T.* 26 *Geo.* 3, were "after such surrender;" whereas those of the more modern rule were "after such trial or judgment." The time of the surrender being made was therefore perfectly immaterial. If it had been made on the last day before *Easter* Term, it would be sufficient (*a*) to compel the plaintiff to charge him in execution in *Easter* Term. But the rule proceeded farther, and provided, "of which the term *in* or *after* which the trial was had shall be reckoned one." This still more clearly shewed that the time of the sur-

trial, and the preceding term. The Court could not divide the vacation; and therefore, if he was in custody at any time during it, he must be considered, by relation, to be in custody during the whole of it. Had he not surrendered until the last day before *Easter* Term, it would have been sufficient.

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LORD DENMAN, C. J.—I am of opinion that the defendant ought to be superseded. It is true, there may be some doubt on the construction of this rule, as to whether it applies to the case of a prisoner actually in custody at the time of the trial, or of one who surrenders afterwards, during the vacation. But, as the application concerns the liberty of the subject, we think it better to hold that the defendant ought to have been charged in execution in *Easter* Term; and therefore, not having been so charged, he is now supersedeable.

LITTLEDALE, J., TAUNTON, J., and WILLIAMS, J., concurred.

Rule absolute.

PYKE v. GLENDINNING.

COMYN shewed cause against a rule obtained to vacate a judgment entered against the defendant, and to arrest the judgment. The costs were taxed, and judgment signed upon the day before the first day of full term. The cause was tried before the sheriff of *Middlesex*, upon a writ of trial under 3 & 4 Will. 4, c. 42, s. 17. He contended, that the judgment operated as a judgment as of the preceding term (a), and therefore that the Court had

The provisions of the 1 Will. 4, c. 7, ss. 2, 4, being extended to proceedings before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17, the Court will, in the next term, entertain a motion to vacate and arrest a judgment signed in vacation.

(a) It was held in *Price v. Hughes*, ante, Vol. 1, p. 448, that the three days before the first day of the term are now part of the vacation.

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Glendinning.

no power now to vacate it (a); and that the defendant must resort to a writ of error.

Mansel, in support of the rule, contended, that, under the provisions of the stat. 3 & 4 *Will.* 4, c. 42, ss. 17, 18, the Court must have the same power as is given by 1 *Will.* 4, c. 7, ss. 2, 4 (b), because the vacating provisions of that statute were, by the 3 & 4 *Will.* 4, c. 42, s. 19, extended to the writ of trial; and the former statute expressly authorized a judgment to be arrested or vacated, though entered in vacation.

PATTESON, J.—Taking these statutes together, I feel myself bound to hear this motion. It was afterwards disposed of upon terms.

(a) Held, in *The King v. Richard Carlile*, 2 B. & Ad. 971, that a judgment could not be altered in a term subsequent to that in which it was delivered. (b) *Ante*, Vol. 1, p. 601; 3 Tyr. 145.

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BREWSTER v. MEAKS.

Where a *sci. fa.*
is unnecessarily

BALL shewed cause upon a rule obtained to set aside

writ, though upon a judgment by default, his client could not be held responsible for them—they were wholly unnecessary, and there was no advantage or consideration for an agreement to pay them.

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BREWSTER
v.
MEARS.

PATTERSON, J.—The treaty made by the attorney, and acted on, binds the client, even as to these costs, admitting the *scire facias* to be unnecessary.

CAREW v. EDWARDS.

FOLLETT shewed cause against a rule obtained by *Mansel* to set aside a writ of *habeas corpus ad satisfaciendum* against the defendant, and under which he was detained in custody of the marshal.

The defendant having previously taken the benefit of the Insolvent Act, a commission of bankruptcy issued against him under 5 *Geo. 2*, c. 30, s. 9, and he had not under that commission paid, clear of all charges, 15*s.* in the pound. Being sued by the plaintiff for a large debt, he pleaded his bankruptcy and certificate; but not being able at the trial to make out that he had paid, under the commission, clear of all charges, 15*s.* in the pound, a verdict passed against him in general terms. He contended, that the motion should have been to have amended the judgment in the terms prayed for, so as to exonerate the person; and that in the present form of application, the execution was correct; and that it did not distinctly appear from the affidavit that the certificate under the commission was proved upon the trial.

The person of a defendant is discharged by certificate, after prior insolvency, although 15*s.* in the pound were not paid.

In such case the certificate being proved, but the verdict entered generally, the Court will make use of affidavits to ascertain the fact of such proof.

After such general finding, the defendant being taken in execution, he may at once apply to be discharged without moving to restrict the judgment.

Mansel submitted, that, as by 1 *Reg. Gen. H. T. 2 Will. 4*,

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v.
EDWARDS.

s. 95 (a), it was not now necessary for the proceedings to be entered on record in order to charge a defendant in execution, there was in fact no judgment; but the execution was sealed upon production of the *postea*, marked with the damages and costs. That the execution was, therefore, irregular, as it would not warrant such a judgment (b) as the plaintiff could lawfully enter up, under the circumstances; and that this objection could be entertained upon a general verdict (c). That the person was clearly discharged by the certificate; and that these facts in substance appeared on the face of the affidavits in support of the rule; and that at all events it would be better for the plaintiff and his attorney to consent to terms, as upon the writ being set aside, on a second application, an action of trespass will lie against them.

PATTESON, J.—As it is not now necessary to enter the proceedings upon record, in order to charge a defendant in execution, the present form of application will suffice; but I doubt whether the affidavits in support of the rule fully shew that the second certificate was proved on the trial.

1834.

MORTIMER v. PIGGOTT.

(Before the four Judges).

SIR JAMES SCARLETT shewed cause against a rule *nisi* for discharging the defendant out of custody, on the ground that the judgment on which the execution issued, and on which he was charged in custody, had been signed more than a year before the issuing of such execution, and had not been revived by *sci. fa.*, or otherwise kept on foot (a). The judgment had been signed on the 19th June, 1819, but the defendant was not charged in execution till September, 1821, without a *sci. fa.* to revive, although the judgment was more than a year old. From that time until the present no effort was made by him to obtain his liberty. Remaining thus in custody for that length of time was a waiver of the irregularity, if any there were.

If a writ of execution, on which a defendant is charged in custody, is a nullity, the lapse of time does not waive his right to apply for his discharge.

Humfrey and *Mansel*, in support of the rule, contended that the proceeding of the plaintiff was not a mere irregularity, but was a nullity. The words of the statute of *Westminster 2* (13 Ed. 1), stat. 1, c. 45; directly required, that, where the judgment was more than a year old, a *sci. fa.* must be issued to revive it (b). The proceeding to charge him in custody without a *sci. fa.* was a mere nullity, and therefore the length of time which had elapsed could not be considered as a waiver on the part of the defen-

(a) As by a former writ returned and filed within the year. *Blay-er v. Baldwin*, 2 Wils. 82; Barnes, 213, S. C.

(b) The reason why the plaintiff is put to his *scire facius* after the year is, because, when he lies by so long after judgment, it shall

be presumed that he hath released the execution; and, therefore, the defendant shall not be disturbed without being called upon, and having an opportunity in Court of pleading the release or shewing cause, if he can, why the execution should not go. 2 Inst. 470.

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dant. If it had been a mere irregularity, the case might have been different (*a*).

LORD DENMAN, C. J.—As by the direct words of the statute a *sci. fa.* appears to be necessary, we must consider the plaintiff's proceeding a nullity. This not being the case, the lapse of time does not bar the right of the defendant to avail himself of the objection.

LITLEDALE, J., TAUNTON, J., and WILLIAMS, J., concurred.

Rule absolute.

(*a*) *Wilson v. Bacon*, ante, p. 450; though the case of a prisoner. *Primrose v. Baddeley*, ante, p. 350.

COURT OF EXCHEQUER,

Easter Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

CLARE *v.* FIESTEL.

1834.

J. JERVIS moved to discharge a rule *nisi* for a new trial obtained by *Curwood*. The rule was granted, on the terms of bringing the amount of the verdict into Court; and the rule *nisi* was drawn up for a new trial, on bringing in the money.

Where a rule *nisi* for a new trial is granted on the terms of bringing the amount of the verdict into Court, the money must be brought in before the rule *nisi* is drawn up.

Jervis contended, that the money ought to have been brought in before the rule was drawn up.

Curwood, contra.

The Court said, the money ought to have been brought in at once, and granted the rule.

Rule granted.

RUSTON *v.* GREENE and ROBSON.

W. H. WATSON shewed cause against a rule which had been obtained by *J. Jervis*, on behalf of the bail in this action, why the time for rendering *Greene* should not be enlarged. Judgment by confession for 200*l.* was obtained against *Greene* last *Hilary* Term, and a *scire facias* had since issued against the bail. In the meantime,

In the case of a *London* as well as a country commission, the Court, on behalf of bail, will, to prevent inconvenience, allow the time for the render to be enlarged.

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RUSTON
v.
GREENE.

a fiat of bankruptcy had issued against *Greene*, and he had been summoned to attend the commissioner.

PARKE, B.—How can you distinguish this from former cases?

Watson.—This is a town commission. *Maude v. Jowett* (a), *Crump v. Taylor* (b), and *Glendining v. Robinson* (c), were cases of country commissions. In *Harris v. Alcock* (d), which was also a case of a country commission, *Bayley, B.*, required an affidavit that it would be inconvenient for the commissioners to attend at *Warwick* or *London* to take the bankrupt's examination. Here, the bankrupt might be taken to *Basinghall Street* on a commissioner's warrant under the 6 *Geo. 4*, c. 16, s. 119, if it should be necessary.

PARKE, B.—There is no case where a distinction has been made between town and country commissions. I have never known such a distinction taken, and I think there is no ground for the distinction.

ALDERSON, B.—The inconvenience would be as great

1834.

ASTLEY v. GOODJER.

HUMFREY moved for a rule *nisi* for a *habeas corpus* to bring up the body of the defendant from *Northamptonshire* gaol. The motion was grounded on an objection to the warrant, by virtue of which the defendant was taken to gaol. It omitted to state out of what Court the process issued; which, he contended, was material. It was always inserted in the old forms previously to the Uniformity of Process Act. In *Tidd's* Appendix (a), a form of warrant is given on process under the new Process Act, which expressly says, "By virtue of the King's writ, issued out of his Majesty's Court of *King's Bench*," &c. No form of warrant is given by the act itself.

It is not necessary that the sheriff's warrant issued upon a *capias* should specify the Court out of which the process issues.

Lord LYNDHURST, C. B.—It proceeds thus: "And I further command you, that, on execution hereof, you do deliver to him the copy of the said writ herewith delivered to you." The writ, therefore, will inform the defendant out of what Court the process issues.

Humfrey.—The warrant is directed to the keeper of the gaol, and *A. B.*, my bailiff; but only one copy of the writ is given, and both cannot have it; and the one who detains the defendant may not have the copy of the writ. The defendant may be inconvenienced by not knowing where to appear; and the warrant ought to have all necessary particulars.

Lord LYNDHURST, C. B.—It is only a direction by the sheriff to the officer. How can it be material to the defendant? The officer is to arrest, and the gaoler detain: the gaoler would have no right to detain till the warrant was delivered to him. The officer having made the arrest de-

(a) Appendix, ann. 1833, p. 274.

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livers the prisoner with the warrant to the gaoler, which is the authority for him to detain. If no copy had been delivered to the defendant, that might be a ground for the motion; but it is not suggested here that no copy of the writ was given, and the defendant would know from that in what Court to appear.

VAUGHAN and BOLLAND, Bs., concurred.

Rule refused.

FYNN v. KEMP.

A motion to set aside proceedings for irregularity was held too late after a lapse of seven days.

HOGGINS had obtained a rule *nisi* for setting aside the declaration and subsequent proceedings for irregularity, the plaintiff having declared *de bene esse* on the 15th, and on the next day an appearance was entered.

R. V. Richards shewed cause, and objected that the motion was out of time, not having been made till the 22nd, the irregularity, if any, having occurred seven days before, in full term.

1834.

DIXON v. ENSELL.

THIS was a motion by the sheriff under the Interpleader Act.

Platt for the assignees, and *Hayes* for the execution creditor, contended that the application was out of time. The rule was dated *April* 16th, and the execution was so far back as the 12th of *June*; a claim under a bill of sale was made on *July* the 25th; and on *September* the 17th there was notice of a fiat in bankruptcy against the defendant. They cited *Devereux v. Johns* (a), and particularly *Cook v. Allen* (b), where the Court held that the sheriff must come promptly.

Jeremy for the sheriff.—The motion was originally made on the 22nd of *January*, but the affidavits were then ordered by the Court to be amended for the purpose of denying collusion (c). Previously to that, a long correspondence had been going on between the parties, particularly during *Michaelmas* Term.

The Court (d) held, that, under the special circumstances of the case, the application was not too late.

The execution creditor having afterwards abandoned his claim, the Court ordered each party to pay his own costs.

(a) *Ante*, Vol. 1, p. 548.

(b) *Ante*, Vol. 2, p. 11.

(c) But in the cases of *Doniger v. Hinzman*, *ante*, p. 424, and *Dobbins v. Green*, *ante*, p. 427, note (b), in the King's Bench Practice

Court, it was held that it is not necessary for the sheriff to deny collusion.

(d) Parke, Bolland, Alderson, and Gurney.

The sheriff, in applying for relief under the Interpleader Act, should come promptly, but a late application will, under special circumstances, be allowed.

Where there was great delay on the part of the sheriff in applying to the Court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claims, the Court refused to make the latter pay costs.

1834.

TAYLOR v. FRASER.

A plaintiff cannot be required to give security for costs unless it appears that he is gone abroad for more than a mere temporary absence.

SANDFORD shewed cause against a rule which had been obtained by *Hance*, calling on the plaintiff to give security for costs, upon the usual affidavit of his being out of the country. From the affidavits in answer it appeared that the plaintiff was a *West-India* merchant, and that he had a domicile here; that he was at present in *Southern Australia*, and was only gone abroad for a temporary purpose, and was expected to return shortly. He cited *Tullock v. Crowley* (a), *Anonymous* (b), and *Cole v. Beal* (c).

VAUGHAN, B.—This is not a case to which the rule requiring security for costs applies.

The other Barons concurred.

Rule discharged, with costs.

IN another case (d), *Byles* moved for security for costs, on an affidavit that the plaintiff was gone to *Sierra Leone*, and had been out there for three months past.

1834.

KNOWLES, Executrix, v. LYNCH.

COMYN moved, upon the statute 19 *Geo. 3*, c. 70, s. 4 (a), for a *certiorari*. Final judgment had been obtained in an inferior Court of record for upwards of 20*l.*; and it was sworn that diligent search and inquiry had been made for the person and effects of the defendant within the jurisdiction of that Court, under the execution which had issued, but that neither could be found.

The rule for a *certiorari* under the 19 *Geo. 3*, c. 70, s. 4, is absolute in the first instance, and applies to all cases where the defendant removes himself and his effects out of the inferior jurisdiction.

It was doubted whether it was a rule *nisi* only or absolute in the first instance, and whether (the debt being above the sum stated in the preamble) the act applied. On a subsequent day, the practice having been inquired into—

Lord **LYNDHURST**, C. B., granted a rule absolute in the first instance, saying, he thought it was within the act, and that the enacting part went beyond the preamble.

Rule absolute.

(a) By which, after reciting that persons served with process issuing out of inferior Courts, where the debt is under 10*l.*, (the 7 & 8 *Geo. 4*, c. 71, s. 6, extended the sum to 20*l.*), may, in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such Courts, it is enacted, “that in all cases where final judgment shall be obtained, in any action or suit, in any inferior Court of record, it shall and may be lawful to and for any of his Majesty’s Courts of record at *Westminster*, upon affidavit made and filed of such judgment being

obtained, and of diligent search and inquiry having been made after the person of the defendant, or his effects, and of execution having issued against such person or effects, and that they are not to be found within the jurisdiction of the inferior Court, to cause the record of the said judgment to be removed into such superior Court, and to issue writs of execution thereupon to the sheriff of any county or place against the defendant’s person or effects, in the same manner as upon judgments obtained in the said Courts at *Westminster*.”

1834.

HARRIS v. DAVIES.

Where, in consequence of the death of the Marshal of the *King's Bench* Prison, there was no one at the gaol who would receive a prisoner charged in execution, the Court enlarged the time.

R. v. RICHARDS applied to the Court respecting the defendant, for charging whom in execution he had before obtained a rule; he stated, that, in consequence of the death of the Marshal of the *King's Bench* Prison, no one at the prison would receive the defendant.

ALDERSON, B.—You must have more time, by leave of the Court.

EATON v. SHUCKBURGH, Bart.

A proposal to refer, made after the commission day, held not to warrant the plaintiff in not proceeding to trial, and that he was liable to pay the costs of the day.

HILL shewed cause against a rule obtained by *Humfrey* for the costs of the day for not proceeding to trial, on the ground that there had been a proposal made to refer, which was the cause of the plaintiff's not proceeding; but it appearing that the proposal was not made till after the commission day—

The Court said that it was then too late; and they

The award, which set out a rule of Court, from which it appeared that the action was brought to recover a sum of money, and that 10*l.* had been paid into Court, and that the parties had consented to refer the action and all matters in difference, and that the costs of the action and the costs of the award were to abide the event of the award, was in these terms: "I do award, that the plaintiff, at the time of the commencement of the action, had no cause of action save and except 10*l.* lent by him to *Hannah*, the wife of the defendant, when sole, and that I find has been brought into Court." The award was treated as being in favour of the defendant, and the Master taxed the costs for him.

It was now contended, that all matters in difference having been referred, the whole matter was opened, and the arbitrator had full power over the 10*l.* paid into Court. *Malcolm v. Fullarton* (a). That the money was paid into Court on payment of the costs of the action up to that time, which admitted that there was once a cause of action; and upon the other matters in difference a sum of 10*l.* was found to be due to the plaintiff. The award, therefore, was in favour of the plaintiff, and the defendant ought to pay the costs. *Secondly*, it was argued that there were no words in the award requiring the plaintiff to pay any thing.

PARKE, B.—The award is founded on the rule which directs the costs to abide the event. That is against you, for the award is clearly in favour of the defendant. The 10*l.* paid into Court were in effect struck out of the declaration, and, therefore, were no longer a matter in difference. In *Malcolm v. Fullarton*, no money was paid into Court.

ALDERSON and BOLLAND, Bs., concurred.

Rule absolute.

(a) 2 T. R. 645.

1834.
DAWSON
v.
GARRETT.

1834.

GROVE v. PARKER.

The motion for bringing up a prisoner under the compulsory clauses of the Lords' Act, must be supported by an express affidavit that all the creditors have been served with notice.

Quære, whether the Lords' Act extends to the case of a prisoner who is in execution for debts under 300*l.*, and also for debts above 300*l.*?

HUMFREY opposed, in the first instance, a motion made by *Petersdorff* under the 32 *Geo. 2*, c. 28, s. 16, to compel defendant to come into Court and deliver a schedule according to that act. He contended, *first*, that the notice given was not sufficient. The notice merely was, that an application against her under the act would be made on the first day of the term; but the act requires notice of an intention to apply to the Court, and also requiring the defendant to give in upon oath an account in writing of the estate of the prisoner in the manner pointed out by the act. Until such notice has been given the prisoner is not bound to give in a schedule, and the Court has no power to swear the prisoner. Here they have applied to the Court in the first instance. *Secondly*, the defendant is in custody on several executions under 300*l.*, and also on other executions for more than 300*l.* As to the latter, she cannot have the benefit of the act; for the 32 *Geo. 2*, c. 28, s. 16, is expressly limited to cases where the prisoner is committed or charged in execution for any debt or damages not exceeding 100*l.* besides costs

ker v. Slater (a), it was held that the debtor could not be brought up by a creditor whose debt exceeded 300*l.*; and *Abbott*, C. J., said, that the act must be limited to the case of a creditor whose debt does not exceed 300*l.* Here, there are creditors the amount of whose respective debts exceeds 300*l.*, as against whom the debtor could not be discharged. There is, therefore, no mutuality. The benefit to the debtor ought to be co-extensive with the remedy given to the creditor; but here the defendant may be compelled to give up all her property for the benefit of a few of her creditors, leaving her exposed to the more serious claims without any thing to meet them. The act was not intended to apply, and does not apply, to such a case. The Court has no jurisdiction if the debt amounts to more than 300*l.* The compulsory clauses ought to be construed in connection with what are called the voluntary clauses; the latter are evidently intended to apply to those cases only where there are no debts of any considerable amount; for the act recites that it is for the ease and relief of persons in execution for debts not exceeding a limited amount. Any other construction would impose extreme hardship on the debtor.

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VAUGHAN, B.—The voluntary clauses certainly are for the relief of the debtor. The compulsory clauses are founded on the supposition that persons in execution might choose to waste their substance in prison, in preference to giving up their property.

Lord LYNTHURST, C. B.—According to your argument, the debtor is not discharged as to 300*l.* creditors, if they do not choose to come in; but if they consent to come in, then the debtor would be discharged. In that case it matters not whether the debts are 300*l.* or 500*l.*, he would

(a) 2 D. & R. 165.

1834.

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v.
PARKER.

CASES ON POINTS OF PRACTICE, EXCH.

be equally discharged; the hardship, therefore, is the same. There is nothing in the other objection; the notice is in the form given in *Tidd's Appendix*.

Humfrey.—There is another objection. By the 16th section notice must be given to all the creditors at whose suit the defendant is detained or charged in custody. The affidavit only states that several creditors were served.

Petersdorff, in support of the rule.—As to the latter point, I have a list of all the causes in which *Lady Parker* is in custody; it is a formal list obtained from the clerk of the papers at the *King's Bench* Prison. There is an affidavit of service on each; all the names correspond; and I submit it was sufficient for us to give notice to all the creditors we could get intelligence of, and those are the persons on the books at the *King's Bench* Prison.

VAUGHAN, B.—That list is not verified by affidavit.

LORD LYNDHURST, C. B.—I think that is a fatal objection.

Humfrey applied for costs.—The motion is for a rule, not for a rule to shew cause.

LYNDHURST, C. B.—It is contrary to the usual course shown in the first in-

1834.

STEPHENS v. PELL.

THIS was an action on a guarantie in this form:—"As assignee of the estate and effects of *R. L.*, a bankrupt, I hereby undertake, in consideration of Mr. *Stephens's* withdrawing the person put into possession of Mr. *L.'s* effects, under a distress for the sum of 350*l.* for rent due to Mr. *Stephens*, that the said sum of 350*l.* shall be paid to Mr. *Stephens* out of the sale of the produce of the same effects." The defendant pleaded specially, that he was assignee of the bankrupt at the time of giving the guarantie, and that he had given it in his character of assignee; that the fiat of bankrupt under which he was appointed assignee had been since superseded, and that he was no longer in possession as assignee, and was not bound by the agreement. The plaintiff demurred, and the defendant joined in the demurrer. The plaintiff had judgment in that demurrer, and, upon the trial before the sheriff, the plaintiff obtained *1s.* damages.

Upon moving for a new trial of an inquiry of damages under a judgment upon demurrer, it is sufficient to produce the under-sheriff's notes verified by affidavit.

Upon a judgment by default or on demurrer, the contract or contracts are admitted as stated in the declaration, and evidence to contradict them, which would be good under the general issue, ought not to be admitted.

Humfrey having obtained a rule *nisi* for a new trial—

Follett shewed cause.—The rule was obtained on an affidavit verifying the under-sheriff's notes: it ought to have been drawn up on reading the notes.

PARKE, B.—It was done to save expense; if the rule had been drawn up otherwise, office copies of the notes must have been taken.

Follett.—We say that the notes do not contain a full report of the evidence. The plaintiff's own affidavit states that he produced evidence of facts not stated in the notes. We are not bound by the under-sheriff's notes as we are by a Judge's notes. Our affidavits shew that the debt for which the action was brought was secured by a mortgage,

1834.
 STEPHENS
 v.
 FELL.

and that there were prior executions, which, if they satisfied out of the goods to which the guarantie applied would have exhausted them. Suppose no rent was paid would the plaintiff be entitled to a verdict for the full amount? It is a case of the greatest hardship upon the defendant, who undertook to pay the debt on the security of goods which have been since taken from him.

PARKE, B.—The defendant engaged to pay the debt and is bound to do so. The plaintiff is entitled to the full amount. If the facts are as you represent, it would have been an answer under the general issue, but not to this inquiry. The engagement is to pay, if the goods are sufficient.

Rule absolute.

(a) In a special action on the case, the first count alleged that the defendant was master of a ship, and was employed by the plaintiff to carry certain cases of biscuits to *Madras*, and that it was his duty to carry them without any unnecessary deviation or delay, but that, contrary to his duty, he unshipped the goods at *Calcutta* in trover. The defendant was judgment by default. At trial before the under-sheriff the plaintiff proved merely the loss of the goods and the expense of the goods and the expense had been put to. It was objected on behalf of the defendant that without proof of the loss of the goods and the damage, the plaintiff was only entitled to nominal damages.

1834.

WILSON v. BROUGHTON.

THIS was a motion to enter a suggestion on the roll under the 43 Geo. 3, c. 46, s. 3, the defendant having been held to bail for 60*l.*, and the plaintiff having only recovered 1*s.*

Follett and *Lumley* shewed cause.—This is not a case within the act. The words of the act are, “arrested and held to bail:” the affidavits here only shew that the defendant was held to bail; but it was necessary that he should have been arrested also. The words of the act are plain, and the arrest, which is the material point, did not take place.

LORD LYNDEHURST, C. B.—In the introductory part the words are, “arrested or held to bail.”

Where a defendant was held to bail in a much larger sum than the plaintiff recovered:—*Quere* whether, if it had been a case within the act 43 Geo. 3, c. 46, by reason of the absence of a reasonable or probable cause for holding to bail to such an amount, the mere fact of the defendant's not having been actually arrested would have been sufficient to deprive him of the benefit of that act?

Follett.—In an action for a malicious arrest both are essential. The case of *Bates v. Pilling*, which occurred in this Court in last *Hilary* Term (*a*), expressly decided that both are necessary; that there must be an arrest as well as a holding to bail. That seems to have been the opinion of the Court of *Common Pleas* in *Amor v. Blofield* (*b*), though there the defendant was neither arrested nor held to bail.

PARKE, B.—In that case the defendant was not put to any inconvenience.

Follett and *Lumley*.—Upon the facts of the case, there is no pretence for the motion. The defendant pleaded a tender of 30*l.*, which sum was paid into Court: upon that

(*a*) Since reported, *ante*, p. 367.

(*b*) 9 Bing. 91; 2 Moore & Scott, 156.

1834.
WILSON
v.
BROUGHTON.

plea the plaintiff got a verdict. The accounts between the parties were complicated, and many of the facts sworn to in support of the motion are contradicted by our affidavit. The case turned in a great measure upon a nice point, whether certain money was paid specifically or generally. It cannot be said that there was no reasonable or probable cause for the arrest.

Bompas, Serjt., and *Kelly*, *contrà*, were directed to confine themselves to the latter point. They endeavoured to shew that there was no reasonable or probable cause for the arrest.

LORD LYNTHURST, C. B.—There is no necessity to give any opinion upon the first point, because I think upon the facts the motion cannot be sustained.

PARKE, B.—The facts are of an equivocal character. I cannot say that there was no reasonable or probable cause. As to the other point, I think it would be very inconvenient to put that construction upon the act which has been contended for. I was not aware that there had been a case in this Court upon the point.

Miller, contra, submitted, that as it was the general practice for the plaintiff to add the *similiter*, and as the defendant's affidavit expressly stated that issue was joined, it must be taken that it was so. The plaintiff does not deny that issue was joined; but merely says, that he added the *similiter* to the general issue, and traversed the plea of infancy, and that the defendant has done nothing more.

1834.
GILMORE
v.
MELTON.

VAUGHAN, B.—In one sense, you are correct in saying that issue is joined, because it is joined on the general issue; but could you be indicted for perjury on that affidavit, because no issue was joined on the second plea? The plaintiff swears that nothing further was done since the plea of infancy than the traversing it, and therefore issue is not joined, because the *similiter* has not been added.

The other Barons concurring—

Rule discharged, with costs.

LAKIN and Others v. WATSON.

THIS was an action by the plaintiffs, as executors of *Watson*, deceased, to recover the amount of a promissory note, dated *April 9, 1827*. The defendant pleaded in abatement the nonjoinder of *Fanny Watson*, a co-executrix of the plaintiffs. Under these circumstances a rule *nisi* had been obtained by *W. H. Watson* and *Henderson*, for amending the writ of summons, by adding the name of *F. Watson* as one of the plaintiffs, on an affidavit that she was a mere nominal

In an action by executors, the defendant pleaded in abatement the nonjoinder of one executor (who had not proved). The Court allowed the proceedings to be amended, on payment of costs, as the Statute of Limitations would have been a bar to a fresh action.

In future, no amendment will be allowed except to avoid the operation of the Statute of Limitations.

1834.
 LAKIN
 v.
 WATSON.

party, not having proved the will, and that the Statute of Limitations would be a bar to a fresh action.

Whately shewed cause upon affidavits. He objected, also, that, by allowing such an amendment here, the plaintiffs would be enabled to try without subjecting themselves to costs under the late act, as they would do if they commenced a fresh action (a).

PARKE, B.—The question is now under consideration in a case in the *King's Bench*, whether the act does not apply to actions commenced previously to the act. The words are general. But an executor may now be protected from costs by a Judge's certificate. With respect to this particular case, I think an amendment ought to be allowed, because, if a new action were to be commenced, it would be barred by the Statute of Limitations. The case of *Horton v. The Inhabitants of the Hundred of Stamford* (b) is an authority, that, where the Statute of Limitations would be a bar, an amendment may be allowed. All the Judges have come to the resolution, that in future, since the Uniformity of Process Act, no amendment of this kind ought to be allowed, unless where the Statute of Limitations would be a bar, and that that is to be the only exception.

... and ALDERSON, Bs.—*Horton v. The Inha-*
 ... express authority upon this

1834.

CRESSWELL v. CRISP.

THIS was an action of debt on a promissory note. The defendant demurred specially to the declaration, and assigned for cause that it was not shewn to be drawn for value received.

The Court refused to set aside a demurrer under the late rule, as being frivolous, the cause of demurrer being, that, in debt on a promissory note, it did not appear that the words "value received" were in the note.

R. N. Clarke obtained a rule *nisi* to set aside the demurrer, as being frivolous; and also that the plaintiff should be at liberty to sign judgment as for want of a plea. He grounded his motion on the rule of *H. T. 4 Will. 4, reg. 2 (a)*.

R. V. Richards shewed cause.—He contended, that there was no authority that debt would lie where the words "value received" were not in a note or bill; and that, in all the cases where debt was held to lie, there were the words "value received" in the instrument. The Court, he said, would not interfere unless the demurrer was plainly frivolous.

Clarke, in support of the rule, cited *Priddy v. Hembrey (b)*, where it was held, that debt would lie by the drawer against the acceptor of a bill of exchange, payable to the drawer or his order for value received in goods. And, in *White v. Ledwick (c)*, it was expressly decided that a bill or note need not express that it is for value received. The new forms of declarations on bills of exchange and promissory notes do not contain the words "value received."

Lord LYNDHURST, C. B.—The forms are only in *assumpsit*. You had your choice of debt or *assumpsit*.

- (a) *Ante*, p. 304. (b) 3 Dowl. & R. 165; 1 B. & Cress. 674.
(c) K. B. 25 Geo. 3; Bayl. Bills, 4th ed. 34.

1834.
 ————
 CRESWELL
 v.
 CRISP.

The rule (a), that, if any declaration in debt, where *assumpsit* will lie, exceeds the length of the form given by the act, no costs of the excess shall be allowed, only applies to costs. I think there is no ground for the application, and that the rule should be discharged.

PARKE, B.—In *Priddy v. Henbrey*, Lord Tenterden relies on the words “value received” being in the bill as one ground on which the action in that case might be maintained.

ALDERSON and GURNEY, Bs., concurred.

Rule discharged.

(a) T. T. 1 Will. 4, “Pleading.”

Earl FERRARS v. ROBINS.

Security for costs cannot be required from a peer, though

IN this action, which was brought by a peer of the realm, the defendant obtained a rule *nisi* for the plaintiff to give security for costs, on the ground that he resided abroad

1834.

HEMING v. DUKE.

CROWDER moved for leave to serve a declaration by sticking up a copy in the office, and leaving a notice for the defendant at the *Army Pay Office*. The writ had been served personally. The action was brought on a bill of exchange, made payable at the *Army Pay Office*. It was sworn, that inquiries had been frequently made at the *Army Pay Office* for the residence of the defendant, but that they could not learn any thing of him.

When the Court will not allow service of a declaration by sticking it up in the office.

Lord LYNTHURST, C.B.—I think that sufficient ground is not shewn for the application, especially as the writ was served personally.

Rule refused.

ROTTON v. JEFFERY.

NICOLL moved that the writ and declaration might be set aside for irregularity, the writ being in debt, and the declaration partly in debt and partly in *assumpsit*. The commencement was in the usual form of the commencement of a declaration in debt, "the plaintiff complains against the defendant of a plea that he render to the plaintiff &c.;" all the counts and the conclusion of the declaration were in *assumpsit*.

Where the writ was in debt, and the declaration was jointly in *assumpsit*, the Court refused to set them aside as being irregular, but left the party to demur.

VAUGHAN, B.—Is not the objection to the declaration a ground of special demurrer?

Nicoll.—In *Marshall v. Thomas* (a), and *Thompson v. Dicas* (b), it was held that a demurrer would not lie. In

(a) *Ante*, p. 208.

(b) *Id.* p. 94.

1834.
 ROTTON
 v.
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the latter case, and in many former ones, it was held that the declaration must conform to the writ.

VAUGHAN, B.—The plaintiff has given a bad declaration, partly in *assumpsit*, and partly in debt. This is not such a nullity as you can move on. You may demur if you can.

BOLLAND, B.—If your application was granted, the other side would move to amend.

Rule refused.

WADE v. MALPAS.

An award made by a barrister cannot be impeached, on the ground of his having decided contrary to law.

THIS cause was referred to a barrister, who had made his award. *Godson* having obtained a rule *nisi* to set it aside, on the ground of the arbitrator having decided against law—

Talfourd, Serjt., was about to shew cause, when the Court called upon *Godson*, who endeavoured to support his rule.

PARKE, B.—I have uniformly refused such motions. You take an arbitrator for better and worse. *Campbell v.*

1834.

BROWN v. KENNEDY.

KNOWLES shewed cause against a rule for judgment as in case of a nonsuit, that issue had not been joined. The affidavit stated, that there was a plea of coverture, and a replication to it, but no rejoinder.

If it appears doubtful whether issue has been joined by adding the *similiter*, the rule for judgment as in case of a nonsuit will be discharged.

Petersdorff, contrà.—The affidavit on which the rule was obtained expressly states that issue was joined. The plaintiff had a right to add the *similiter* to the replication, which may have been done without the defendant's knowledge.

The Court, consisting of Lord LYNTHURST, C. B., VAUGHAN, BOLLAND, and WILLIAMS, Bs., discharged the rule.

Rule discharged.

MUDIE v. NEWMAN.

PETERSDORFF moved to make absolute a rule *nisi* for judgment as in case of a nonsuit. The rule was left at the house where the plaintiff's attorney had resided; but the attorney, it was said, had left the house, and it was not known where he was gone. A copy was also stuck up in the office.

Where regular service of a rule is endeavoured to be dispensed with on the ground of absence, or otherwise, the affidavit must shew what efforts have been made to serve the party before secondary service will be allowed.

ALDERSON, B.—That is not sufficient. You must shew what efforts have been made to serve the party with the rule *nisi* .

Rule refused.

1834.

TYSER v. BRYAN.

The Court refused to set aside a *distringas* for irregularity, because, in the copy of the writ of summons which was left, the name of *Andrew Bryan* was put as the defendant's name instead of *Andrews Bryan*.

THIS was a rule which had been obtained by *Dunbar* for setting aside a *distringas*, on the ground that a true copy of the writ of summons had not been left at the defendant's residence. The summons was against *Andrews Bryan*, and the copy had the name of *Andrew Bryan*.

Erle shewed cause.—He urged, that the mere omission of a letter, where it could not mislead, was no infringement of the rule, which required that due diligence should be used to serve the writ before a *distringas* could be obtained.

Dunbar, contra, contended, that the rule required a true copy to be left; that the names were not *idem sonans*, nor the same name; and that it could not therefore be true that a copy had been left; and the *distringas* was therefore irregular.

PARKE, B.—The summons was right, and the copy left was sufficiently a copy for the purpose of a *distringas*. You have your remedy by appearing.

1834.

HAYTHORN v. BUSH.

WHITMORE applied on behalf of the sheriff of *Staffordshire* for a rule under the Interpleader Act, upon an affidavit, which stated that he had received a *fiery facias* for 93*l.*, which had been issued against the goods of the defendant, and by virtue of which he had seized goods in the defendant's house; but that the officer found a man in possession under a distress for rent, and that the defendant had since petitioned the Insolvent Debtors Court; that an application had been made to the plaintiff for an indemnity, which he had refused, and threatened to bring an action, alleging a fraudulent collusion.

Where the sheriff seized goods in execution which were under distress for rent due to the landlord, the Court refused to grant him relief under the Interpleader Act, though he had applied for indemnity to the execution creditor, which had been refused.

VAUGHAN, B.—It is the duty of the sheriff to inquire whether the rent is due, and if it is, to satisfy it.

LORD LYNTHURST, C. B.—This is a case of the ordinary responsibility of the sheriff, in which the Court ought not to be called on to interfere.

BOLLAND and WILLIAMS, Bs., concurred.

Rule refused (a).

(a) See *Clarke v. Lord*, ante, Vol. 2, p. 55, 2nd point.

CHAPMAN v. HICKS.

THIS was an action of debt for 5*l.* 9*s.* Plea, as to all except 9*s.*, *nil debet*, and as to that a tender. But the defendant's attorney having neglected to pay the 9*s.* into Court, judgment had been signed on the whole declaration as for want of a plea.

In an action of debt the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money

into Court: judgment having been on that account signed as for want of a plea, the Court set aside the judgment for irregularity.

1834.
 CHAPMAN
 v.
 HICKS.

Archbold having obtained a rule *nisi* for setting aside the judgment for irregularity—

John Jervis shewed cause; and he relied on *Pether v. Shelton* (a), where it was held, that, upon a plea of tender, if the money was not brought into Court, the plaintiff might sign judgment.

PARKE, B.—It is consistent with that case, that the plea went to the whole of the issue. Here, there was a good plea as to part of the action, and the judgment ought not to have embraced that part.

Rule absolute, with costs.

(a) 1 Stra. 631.

EDWARDS v. DIGNAM.

PETERSDORFF moved for a new trial in this action, (which was tried before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17), on the ground of the verdict being against evidence, and absence of a material witness for the defendant.

The rule which forbids a motion for a new trial where the amount is under 20*l*, except for misdirection of

The Court granted a rule *nisi*.

Miller shewed cause.—He contended that the mere absence of a witness who was a clerk to an attorney was no ground for a new trial, as no application was made to postpone the trial; and that the evidence supported the verdict.

1834.
EDWARDS
v.
DIGNAM.

Petersdorff, in support of the rule.—It is sworn that endeavours were made to obtain the witness without effect. There was evidence that a portion of the demand had been paid.

PARKE, B.—It cannot be said that the verdict is against evidence. You come too late with the other objection; you should have applied to postpone the trial.

Rule discharged, costs to be costs in the cause.

SAVAGE v. BINNY.

R. v. RICHARDS applied to amend a rule which had been obtained for a *mandamus* to examine witnesses in *India*; the rule having been drawn up by the officers for a commission, conceiving that this Court could not grant a *mandamus*. He referred to the statute 13 Geo. 3, c. 63, s. 44, which gives power to all the Courts to issue a *mandamus*; and he stated that it was the practice to do so in the *Common Pleas* (a).

The Court of Exchequer has the same power as the Court of King's Bench, since the 13 G. 3, c. 63, s. 44, to issue a *mandamus* or a commission for the examination of witnesses abroad.

PARKE, B.—The rule must be amended.

(a) *Grillard v. Hogue*, 1 Brod. & B. 519; 4 Moore, 313.

1834.

GRAINGE *v.* SHOPPEE.

On moving for a new trial under the 3 & 4 W. 4, c. 42, s. 17, (the Writ of Trial Act), the proper course is to have the notes of the presiding officer verified by affidavit, without affidavits of the facts.

THE SINGER moved to set aside the verdict for the defendant in this action, (which was tried before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17), and for a new trial, as being a perverse verdict, and contrary to the opinion and summing up of the secondary. He moved on affidavits of the facts.

BOLLAND, B.—The proper course is to have the notes of the presiding officer verified by affidavit, without affidavits of the facts. This is the rule laid down by all the Judges, and will save expense and trouble.

HAINES *v.* TAYLOR.

Where a peremptory undertaking had been given to try, but the plaintiff neglected to go to trial in time, because it was found that the

IN this case a previous rule for judgment as in case of a nonsuit had been discharged upon a peremptory undertaking to try at the last assizes. Notice of trial was accordingly given, but was countermanded; and the plaintiff not having gone to trial pursuant to his undertaking, a rule absolute in the first instance for judgment as in case of a

R. V. Richards.—It has altered very much of late years. When there has been a *bond fide* excuse for not proceeding, it has been usual to grant indulgence. Here, there was a proposal to refer.

1834.
HAINES
v.
TAYLOR.

PARKE, B.—We think no sufficient ground has been shewn for not complying with the peremptory undertaking.

Rule discharged, costs to be costs in the cause.

ROBSON v. BLACKWELL.

THIS was an action for a libel published in a *Newcastle* paper. *Platt* obtained a rule *nisi* for changing the venue from *London* to *Newcastle*, on an affidavit of the defendant, which stated that several pleas of justification were to be pleaded, and that all the witnesses lived at *Newcastle*; that the paper was published there; and that the expense would be greatly increased if the action was tried in *London*; and that the cause of action, if any, arose in *Newcastle*, and not elsewhere. The motion was made before the time for pleading was out, and before fresh time had been obtained.

In an action for a libel published in a country local newspaper, the Court allowed the venue to be changed upon a special affidavit.

Curwood shewed cause, and contended that the venue in an action for a libel could not be changed, because it was impossible to say that the whole of the cause of action arose in any particular county.

PARKE, B.—We cannot take notice that a local paper circulates beyond the place, unless it is such a general newspaper as would be likely to be read in other places.

Curwood.—One copy must be sent to the *Stamp Office*;

1834.
 ROBSON
 v.
 BLACKWELL.

and the country newspapers may be found at all the *London* coffee-houses.

Lord LYNDHURST, C.B.—The act of Parliament requires the paper to be sent to the *Stamp Office*. It appears to me to be a question upon the affidavits, and that the rule should be made absolute.

Rule absolute.

JOHNSON v. LAKEMAN. SAME v. SAME.

Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favour, and in the other the plaintiff obtained a verdict with damages, the Court refused to stay proceedings in the first action until a motion for a new trial in the

THESE were actions on the same agreement for the hire of a steam-boat. The first was in *indebitatus assumpsit*, to which the defendant pleaded the general issue and a set-off. The cause was referred to a barrister, who awarded in favour of the defendant. In the meantime the other action was commenced for special damage for misusing the steam-boat, and in this the plaintiff got 80*l.* damages at the assizes; but a rule *nisi* having been granted for a new trial just before the award was made in the first action—

Hughes, on behalf of the plaintiff, moved that the exe-

1834.

BROOK v. EDRIDGE.

THE defendant, upon being served with process in this action, snatched the original writ of summons out of the hands of the person serving it.

If the defendant improperly gets possession of the writ of summons, the Court will allow an appearance to be entered without any indorsement, and order the defendant to pay the costs.

Sewell, thereupon, moved for a rule, calling on the defendant to shew cause why he should not deliver up the writ of summons; and why the time for appearing to the writ should not be computed from the time when the defendant so got possession of it; and why, if defendant should not deliver it up, the plaintiff should not be at liberty to enter an appearance without any indorsement on the writ as required by the act; and why the defendant should not pay the costs of appearance.

The Court granted the rule.

DIPPINS v. Marquis of ANGLESEA.

IN this case a motion had been made to set aside an award on certain objections; but it was afterwards arranged that it should come on in the form of a special case: and, upon its being called on, *Manning* was proceeding to argue in support of the award, when he was stopped by the Court.

Where a rule to set aside an award is made into a special case, the counsel who objects to the award ought to begin and have the reply.

Lord LYNTHURST, C. B.—The proper way will be for the counsel who objects to the award to begin, and then for the opposite counsel to answer him, and the first counsel to have the reply, the same as if it had come on upon the rule first granted.

1834.

The KING against the Sheriff of ESSEX, in a cause of
ALEXANDER v. BARRINGTON.

If, in consequence of bail not being put in and perfected, the plaintiff obtains an attachment against the sheriff, without having declared *de bene esse*, the latter may set aside the attachment, upon the defendant being rendered, without the attachment or bail-bond standing as a security.

THESIGER, on behalf of the sheriff of *Essex*, obtained a rule *nisi*, calling on the plaintiff to shew cause why the rule for an attachment, and the attachment issued thereon against the sheriff for not bringing into Court the body of the defendant, should not be set aside upon payment of costs. The affidavit in support of the rule stated, that the application was really and truly made on behalf of the officer at his own expense, and for his only indemnity, and without collusion with the defendant.

Austin shewed cause.—It appeared by the affidavits on both sides that the defendant was arrested on the 10th of *March*, and on the same day gave a bail-bond to the sheriff. On the 25th of *March*, the sheriff was ordered to return the writ, to which the sheriff returned *cepi corpus*. On the 3rd of *April*, the sheriff was ordered to bring in the body within six days. The order not being complied with, on the 17th of *April* a rule was obtained for an attachment, returnable on the 28th. On the 21st, bail was

PARKE, B.—He might have declared *de bene esse*; and not having done so, the rule will be absolute on payment of costs, without the attachment or bail-bond standing as a security.

Rule absolute, on payment of costs.

1834.
The KING
v.
The Sheriff
of
Essex.

GARRY v. WILKS.

CHILTON shewed cause against a rule which had been obtained by *Archbold* on behalf of the defendant, calling on *James Fowler* to shew cause why he should not pay over to *Wilks* the sum of 20*l*.

It appeared that *Garry* had been attorney for *Wilks* in defending an action upon the terms, as the latter alleged, of charging only money out of pocket; but this was denied by *Garry*, who said the agreement was not to charge extra costs. *Garry* having brought the present action for his bill of costs, it came on for trial in *February*, 1833, and a verdict was found for the plaintiff, when it was proposed that he should accept 6*l*. for the debt and 12*l*. for costs, and the amount was to be paid in a fortnight; and this was agreed to. It was sworn by *Wilks*, that *Garry* soon afterwards absconded, and sold off every thing, and he could not be found to tender the money to; but *Fowler*, at the expiration of a fortnight, applied as agent for *Garry* for 18*l*. On *March* 3rd, the defendant paid 15*l*., for which *Fowler* gave a receipt on account of the debt and costs recovered in the action; and there was a memorandum indorsed, that, if *Wilks* paid 3*l*. in addition to the 15*l*. on the 19th of *March*, it would be accepted in full satisfaction of the verdict. The 3*l*. not being paid, judgment was signed, notice of taxation given, and the defendant was taken in execution for the full amount of costs, making a difference of 24*l*. between the costs as taxed and the sum agreed to

Where an attorney was charged with oppression towards his client, but the application was not made till after three terms had nearly elapsed, and no attempt was made to explain the delay, it was held that the motion was too late.

1834.

GARRY
v.
WILKS.

be taken. The defendant, on being taken, had paid into the hands of the sheriff 20*l.*, which was paid over by him to *Fowler* on *June* 1st, 1833, and was the sum now sought to be recovered. It was sworn by *Fowler*, that, though *Garry's* offices were closed, there was a notice stuck on the door that the business was carried on at *Fowler's* office; and that the defendant had been distinctly told, that, unless the 3*l.* were paid on the 19th of *March*, the plaintiff would claim his debt and taxed costs. It was contended that he was strictly entitled to do so, and that the application was too late, as *Trinity*, *Michaelmas*, and *Hilary* Terms had been suffered to pass by, and there was no attempt at explaining the delay. The motion was made at the close of *Hilary* Term.

Archbold, *contra*, was desired to confine himself to the latter point. He contended, that it was a case of gross oppression on the part of an attorney; and that the Court would not deny relief in a case of misconduct by one of its officers, merely because the motion was not made so early as it might have been.

The Court, consisting of VAUGHAN, BOLLAND, GURNEY, and WILLIAMS. Res. held that the delay had been

PARKE, B.—This is such an application as ought to be made at chambers.

Rule refused (a).

1834.
BASSETT
v.
GIBLETT.

(a) In *Wright v. Cross*, in this term, *Addison* having obtained a rule *nisi* to compel the plaintiff to produce the copy of an agreement to be stamped, *Alexander*, without opposing the rule, objected to pay

costs; and *Parke, B.*, observing that such business was now always transacted at chambers, made the rule absolute without costs.

ASHTON and Others v. POINTER.

KELLY moved to set aside an award. The action was brought by the plaintiffs, as executors, to recover a balance of 50*l.* claimed to be due from the defendant. By an order of *Nisi Prius*, the cause and all matters in difference were referred to two persons, one of whom was not a professional man, and the other (the defendant's arbitrator) was an attorney. The award found a sum of 8*l.* to be due from the testator to the defendant. It appeared from the affidavits, one of which was from the plaintiffs' arbitrator, that there had been yearly accounts stated between the testator and the defendant, upon all of which the balance was in favour of the former. The last account shewed a balance of 50*l.*, which the defendant first said he had paid by a 50*l.* note; but it was clearly proved that that note was given in payment of a bill of exchange for 50*l.* He then said he had paid it at another time, and wished to be sworn. He was objected to by the plaintiffs' attorney, but admitted by the arbitrator. Upon being sworn, the defendant swore positively to having paid the money, and produced a memorandum in his own handwriting, which he said he had made at the time, but could give no other evidence of payment. It was also objected by the

Where matters in difference are referred to a legal arbitrator absolutely, the Court will not entertain a motion for reviewing his decision either upon the law or the facts.

If the reference is to a non-legal arbitrator, the Court will review his decision as to a point of law, but not upon the facts, unless his award appears so glaringly wrong as to induce a suspicion of misconduct.

Where a cause was referred to an attorney and another person, the Court granted a rule for setting aside the award upon a point of law.

1834.
ASHTON
v.
POINTER.

defendant that a sum of 8*l.* had been improperly made part of the plaintiffs' account. As to that, it appeared that, in 1825, the testator had sold to a son of the defendant goods to the amount of 8*l.*; and, to prevent his son being sued, the defendant requested that it might be put to his account, which was accordingly done, and formed part of the yearly accounts from that time. The defendant's arbitrator, the attorney, persuaded the other arbitrator, that, in point of law, there was an objection to its being allowed in account, as no agreement in writing was proved, which he said was necessary, by the Statute of Frauds, to make the defendant liable, as it was an agreement to answer for the debt of another; and that sum was thereupon found to be due from the testator to the defendant. It was now contended that the award was bad both upon the law and the fact.

PARKE, B.—You can only move on the legal ground. You cannot move on the facts, unless so glaringly wrong as almost to amount to misconduct in the arbitrators.

Kelly.—The arbitrators are non-legal arbitrators. They have grossly mistaken the law, and upon the facts the award is obviously wrong. I have looked into the autho-

except for objections apparent on the face of it; any thing amounting to misconduct would be a ground, but that is not sufficiently shewn. If they give up the 8^l. all objection will be removed.

1834.
 ASHTON
 v.
 POINTER.

Rule *nisi* accordingly.

KNOWLES v. JOHNSON.

F. V. LEE moved to set aside a writ and declaration for irregularity, the writ being general and the declaration special, as assignee. He cited *Archbold's Practice*.

A writ being general and the declaration special, held to be no ground for setting them aside as irregular.

PARKE, B.—There is no incongruity: the declaration shews the character in which the plaintiff was suing.

Where two of three parties to a bail-bond were sued jointly, held to be no irregularity.

LORD LYNTHURST, C. B.—You cannot assume that the parties are different.

F. V. Lee.—There is another objection, that, the action being on a bail-bond, they have declared against two of the three parties to it jointly, whereas they ought to have sued all jointly, or each separately.

PARKE, B.—There is nothing irregular at present; if they declare against the other, they will then be irregular.

Rule refused on both grounds.

1834.

SMITH v. PENNELL.

A lapse of six days held not too great to preclude a motion for setting aside the copy of a writ for irregularity.

The omission of the word "*London*," in the indorsement on the copy of the *capias*, held sufficient cause for setting aside the copy.

TOMLINSON shewed cause against a rule which had been obtained by *Chandless*, for setting aside the copy of the writ of *capias*, and for discharging the defendant out of custody, on the ground of irregularity, the writ being indorsed—"Old Jewry, London," and in the copy the word "*London*" was omitted. He contended, that the application was too late, six days having been allowed to pass between the arrest and the application; and he cited *Tucker v. Colegate(a)*, where it was held to be too late to take an objection to the affidavit of debt after the time for putting in bail above has elapsed.

But the Court being of opinion that the motion was in time, *Tomlinson* contended, that there ought to have been office copies of the documents, and it should have been shewn they had been examined; but the affidavit merely stated that the deponent examined the copy served with the original in the *Sheriffs' Office, Red Lion-square*, and that the paper writing annexed was a true copy of the indorsement.

1834.

BAYLEY v. THOMPSON.

THIS was an action of replevin, and, being removed by the defendant into this Court, he ruled the plaintiff to declare. The declaration was delivered in the name of *Frank Dickens*, (as the attorney). The defendant, believing from inquiries that there was no such person as *Frank Dickens* an attorney, signed judgment of nonpros.

Where a declaration was delivered in the name of a person as the attorney, but who in fact was not so, it was held that the defendant could not treat the declaration as a nullity, and sign judgment.

Heaton obtained a rule *nisi* to set it aside as irregular; against which—

Thesiger shewed cause.—It is positively sworn that *Dickens* is not an attorney on the rolls of this Court, and it is not sworn on the other side that he is. He was described as residing at No. 60, *Nelson Square*; but inquiries have been made there and in the neighbourhood, and no such person could be found. Search has been made at the *Stamp Office*, and no such person has got a certificate; nor is the name in any of the books where the attorneys' names are registered in this Court. A declaration so delivered is a nullity. In *Hawkins v. Edwards* (a), where the process appeared to be sued out in the name of *A.* by *B.*, neither of whom were attorneys of the Court, and *B.* had not the authority of any other attorney to act in his name, the Court set aside the proceedings, and ordered *A.* and *B.* to pay the costs.

PARKE, B.—How does the client know that he is not an attorney? You make him suffer. Besides, you kept the declaration.

Heaton in support of the rule.—The declaration may

(a) 4 Mo. 603.

1831.
BAYLEY
v.
THOMPSON.

have been irregularly delivered, but it is not a nullity. In *Welch v. Pribble* (a), it was held to be no ground for cancelling the bail-bond, that the attorney who sued out the writ had neglected to take out his certificate; and it was said by *Bayley, J.*, that the interests of the client were not to suffer by the negligence of the attorney. In *Paterson v. Powell* (b), the Court allowed a notice of trial given by an attorney who had not taken out his certificate to be set aside as irregular; but there is no authority for shewing that proceedings merely irregular may be treated as absolutely void. There is no allegation in the affidavits that he is not an attorney.

Per Curiam.—This rule must be absolute. Judgment ought not to have been signed as if the declaration was a nullity; but you may, if you please, move for a rule to stay proceedings, until a proper attorney has been appointed.

Rule absolute, with costs.

(a) 1 D. & R. 215.

(b) 9 Bing. 620.

JONES v. ROBERTS.

THIS was an action by the plaintiff as executor, for
due to the testator, who was
for busi-

not liable for part, in consequence of certain delay in the conduct of that part of the business, by which the defendant had lost the whole benefit of it: the Master, however, refused to make any distinction between one part of the bill and another, thinking he had no right to do so. *R. F. Richards* thereupon obtained a rule *nisi*, calling on the plaintiff to shew cause why the Master should not tax that part of the bill of costs which was disputed, separately from that part which was not disputed.

1834.
JONES
v.
ROBERTS.

J. Jervis shewed cause.—This is a novel motion: the bill was referred to be taxed under the common order, to pay what should be found to be due. It ought at least to be shewn on the affidavits that the proceedings were unnecessary or useless; but it is only said that it was urged before the Master that they were so. The Court has no power to grant this motion. The authority on which the Court acts is the 2 *Geo. 2*, c. 23, s. 23, which directs the taxation of a bill to be upon a certain condition, namely, the submission of the party to pay the whole sum which upon taxation shall appear to be due. The Court has no power independently of the statute. The case of *Wilson v. Gutteridge*(*a*), where the Court of *King's Bench* said they had a paramount jurisdiction independently of the statute to refer a bill for taxation, was decided apparently without consideration; and was virtually overruled by the late case of *Dagley v. Kentish* (*b*), where a rule for referring an attorney's bill for taxation, on the ground of the general authority possessed by the Court over its officers, was discharged after a conference with the other Judges. The effect of this rule would be to try a question of liability, which the Master has no power to do.

(*a*) 3 B. & C. 157.

(*b*) 2 B. & Ad. 411.

1831.

JONES
v.
ROBERTS.

CASES ON POINTS OF PRACTICE, EXCH.

Richards in support of the rule.—This is a bill of costs for several distinct businesses. To some parts of the bill no objection is made. Another portion of the bill is so tainted with negligence, that no cause of action arises upon it, and to that we dispute our liability. As to the undisputed part of the bill we are clearly liable, and must, unless this motion be granted, go to trial with a certainty of being defeated. The order, therefore, ought to have been to tax that part of the bill which is not disputed, and to leave the other part which is disputed untaxed, and the question would then come fairly before a jury.

VAUGHAN, B.—The bill must have been sent to be taxed by consent, otherwise I should not have made the order. The bill having been sent to be taxed on the common order, you are precluded by it; and the affidavits ought to have been more precise. I have always considered the taxation of an attorney's bill as depending upon the statute of *George 2*.

GURNEY, B.—The affidavits do not shew what parts of the bill are admitted and what not. As this is an experiment, the rule must be discharged with costs.

Rule discharged, with costs (a).

ter; and the Court refused to set
son's order for taxation,
taking to

1834.

KERBEY v. SIGGERS and Others.

THIS was an action of trespass; and the defendants pleaded in abatement the pendency of another action against them in the *Common Pleas* for the same identical trespasses, concluding with a *prout patet per recordum*. The plaintiff ruled the defendant to produce the record.

Upon a plea in abatement of pendency of another action in another Court for the same cause, concluding with a *prout patet per recordum*, it is sufficient to satisfy the plea if a record of a writ is produced.

John Jervis having moved for judgment for not producing the record—

Mansel, contra, contended, that there was a sufficient record produced (and was then in the Master's hands) to satisfy the plea, namely, a record brought in upon *certiorari* out of the *Exchequer*, of the entry of an award of a writ of summons out of the *Common Pleas* between the same parties. No notice was given that that writ was abandoned.

J. Jervis objected, that there was nothing on that record to shew that the two actions were for the same causes of action. There was nothing on the roll but a writ in trespass. It is true, a writ was issued out of the *Common Pleas*, but it was never served; and it could not have got into the possession of the defendants.

PARKE, B.—The question is, whether, if any writ is produced, it is not a sufficient compliance with the plea? If the fact is as stated, there ought not to be such a record; but the proper course will be to apply by summons to the Court of *Common Pleas* to take it off the file.

[This was afterwards done, and the Court of *Common Pleas* quashed the roll, and the plaintiff had judgment as upon a failure of record.]

1834.

GUNN v. M'CLINTOCK.

Where a defendant was arrested in *Ireland* for the amount of a bill of exchange, and gave bail there, which were discharged for a defect in the affidavit to hold to bail; and the plaintiff, having afterwards got judgment in *Ireland*, arrested the defendant a second time: in an action in this country on the judgment—*Held*, that the defendant was entitled to his discharge.

HENDERSON shewed cause against a rule which had been obtained by *Miller*, for discharging the defendant out of custody on entering a common appearance, on the ground that he had been arrested here upon a judgment obtained in *Ireland*, having been before arrested in *Ireland* for the cause of action on which the judgment was founded. It appeared from the affidavits, that the arrest in *Ireland* was for 121*l.* on bills of exchange: bail were given, but were discharged on a common appearance: it did not however appear how the bail became discharged. A *cognovit* was given by the defendant, upon which judgment was signed. The arrest was here for 164*l.*, the amount of that judgment. It was contended, that the rule, that a defendant could not be twice arrested for the same cause of action, did not apply here. In *Maule v. Murray* (a), where a defendant, who had been arrested in *America*, was again arrested here for the same cause of action, the Court refused to discharge him. In *Imlay v. Ellefson* (b), where the defendant had been before holden to bail in *Norway*, and was then arrested here for the same cause of action, the Court refused to interfere, because it did not distinctly appear that the plaintiff had the remedy and advantages in the foreign country as he had here. In *Tidd's Practice* (c), it is laid down that a defendant arrested abroad,

him, because it did not clearly appear by the affidavits that the plaintiffs had the same remedy in the colony which they would have in this country. The question here is, whether the plaintiff had the same security in the foreign country as he would have here. He had not the same security in *Ireland*, because it appears the bail were discharged on a common appearance, and the present is not the same form of action or cause of action; this is debt on a judgment for 164*l*. The defendant has no reason to complain, as he might have been taken on a *ca. sa.* on the judgment in *Ireland*.

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 }
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Miller in support of the rule.—The case of *Imlay v. Ellefson* is decisive to shew, that, if the laws of both countries are the same, an arrest in this country is not permitted after an arrest in a foreign country. The ground of discharge in *Ireland* ought to have been shewn. The practice is the same in *Ireland* as in *England*. The consequence of the arrest in both countries is the same, that bail must be given. In *Bowen v. Barnett* (a), an action on a judgment is considered by the Court as a vexatious proceeding; and it is there said, that, if there was special bail in the original action, the plaintiff is not entitled to have bail in the latter; and in *Tidd's Practice* (b) this rule is so laid down.

LORD LYNTHURST, C.B.—The difficulty is, that it is not explained why the defendant was discharged on common bail in *Ireland*. If bail had continued liable there, the defendant could not have been again arrested here, though the arrest was on mesne process in *Ireland* for the original cause of action, and the arrest here is on a judgment.

The motion stood over till the next day, at the expense

(a) Sayer, 160.

(b) 9th edit. p. 177.

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of the plaintiff, for an affidavit explaining the cause of the defendant's discharge in *Ireland*; which was accordingly procured, and from which it appeared that it was for a defect in the affidavit to hold to bail.

The Court therefore made the rule absolute, with costs.

Rule absolute, with costs.

PRIMROSE v. BRADLEY.

Where an application was made against the deputy constable or bodar of *Dover Castle*, on the ground of his having taken larger fees for executing process than those allowed by the 23 *Hen. 6, c. 9*, but only the usual fees had been allowed by the Master, the Court refused to interfere, but left the party to his remedy by action.

MANSEL moved on the part of the plaintiff to review the Master's taxation of a bill of costs of a Mr. *Paine*, which had been delivered pursuant to a Judge's order. *Paine* was the deputy constable or bodar of *Dover Castle*, and was employed by the plaintiff to serve writs, &c. for him. It was said, that, as he was acting as under-sheriff, he ought to be allowed only such fees as the statute of 23 *Hen. 6, c. 9*, allowed, which was 4*d.* for a warrant; but he had charged 4*s.* for the warrant, and 6*s. 8d.* for attendance. He referred to *Dew v. Parsons (a)*, where certain fees were claimed by the sheriff as having been usually paid him; but Lord *Tenterden* said, that usage could not repeal an act of Parliament. The Master had allowed the charges. The object of the motion was to review, and to have the money

lock (a), Lord *Tenterden* allowed the officer to recover his usual fees: his Lordship says, "Here the bailiff could claim no fee beyond the 4*d.* allowed by the 23 *Hen.* 6, against the party arrested, but the prohibition extends to him only. This question is therefore open, whether, if an officer be specially employed to make an arrest, it may not be presumed that the party so employing him gives him to understand that he will pay such sum as the Court upon the taxation of costs is in the habit of allowing. I think that such an understanding may very fairly be presumed." And in *Townshend v. Carpenter* (b), *Abbott*, C. J., held, that an attorney was liable to an action by a bailiff for his fees, in making captions and executing writs, upon evidence of the custom of attornies to pay the bailiffs, and the fees being those usually paid on these occasions, and allowed by the Master on taxation, though they were much beyond what the statute allows. The bill of costs in the present case has been taxed according to the usual scale of charges, some of which are regulated by the distance.

1834.
PRIMROSE
&
BRADLEY.

Mansel.—The charge in the bill is for a warrant; and, according to *Dew v. Parsons*, such charges as are contrary to the act of Parliament ought not to have been allowed.

LORD LYNTHURST, C. B.—*Dew v. Parsons* was an action by an officer for his fees. This is a summary application against an officer. It appears, that the process was sent to the officer in a letter; he had therefore additional trouble and expense; he had to open and read the letter, besides paying postages and expenses. I think this is a case in which we ought not to interfere; and we leave you to adopt any other remedy you may have.

BOLLAND, B., concurred.

(a) 5 B. & C. 328.

(b) *Ryan & Moody*, 314.

1834.
 PRIMROSE
 v.
 BRADLEY.

ALDERSON, B.—You are applying to have the sheriff's bill taxed; but, after adopting him as your agent, you cannot turn round upon him as sheriff.

Rule discharged.

Trinity Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

THOMAS v. EDWARDS.

The Court will allow further time to make a motion for a new trial, if the under-sheriff does not furnish his notes of the trial in proper time.

KELLY applied to the Court to be allowed further time to make a motion for a new trial in this action on account of the under-sheriff not having sent up his notes of the trial. He mentioned a case where the Court of *King's Bench* had, under similar circumstances, allowed the motion to stand over to another day.

PARKE, B.—You may take your motion; and if the under-sheriff refuses to let you have his notes, bring the facts before the Court upon affidavit.

Motion granted.

plaintiff's cause of action filed in this Court, as required by the statutes in such case made. To this plea the plaintiff demurred specially, and assigned the following as causes of demurrer:—That the said matters pleaded in the said plea, as to the sufficiency of the affidavit of the cause of action, as required by the statutes in such case to be made, filed in this Court, is a matter of law for the decision of the Court, and not for a jury; and such matters should not be left to a jury; and that said plea should have been framed so as to have referred the matters therein stated to the Court; and also, for that the said plea consists altogether of matter of law; and also, for that the matters pleaded in the said plea, by way of defence, cannot be so pleaded; and also, for that the said plea has no conclusion whatever either to the country, or with a verification, and has no proper conclusion. Joinder in demurrer.

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—
SNOW
v.
STEVENA.

Erle appeared for the plaintiff; but the Court called upon *Mansel* to support the plea.

Mansel.—There are two questions—*first*, whether in form the plea is correct; *secondly*, whether in substance it is an answer to the declaration. *First*, the form of the plea is correct. By rule 9 of *Hilary Term, 4 Will. 4*, in a plea or subsequent pleading intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment. This being a negative plea no verification was necessary. *Millner v. Crowdall* (a). *Secondly*, with regard to the substance of the plea, it shews a sufficient answer to the action. The plea is analogous to that pleaded by bail, that there was no writ of *ca. sa.* duly issued and prosecuted against the principal (b). The matter put in issue is not matter of law but of fact,

(a) 1 Shower, 388.

(b) Chit. Pl. Vol. 2, p. 520, 3rd edit.

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v.
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whether there was any affidavit. This case differs materially from that of *Hume v. Liversedge* (a), where the defendant pleaded "that no *proper* affidavit of the cause of action to the amount of the said sum was ever made or filed of record," &c. There the Court held, that no certain or proper issue could be taken upon the plea, because it was uncertain what was meant by a *proper* affidavit. But they said, that the defendant might have pleaded that there was no affidavit except &c. This shews that the present plea is good. The proper course was for the plaintiff to reply, that there was such an agreement, and to set it out *in hæc verba*. *Lowe v. Eldred* (b). Although it was not necessary for the plaintiff to allege an affidavit in his declaration, yet it is clear, from the various statutes, that the want of such affidavit is an answer to this action. By the 12 *Geo.* 1, c. 29, s. 2, where the plaintiff's cause of action shall amount to the sum of 10*l.*, or upwards, an affidavit shall be made and filed of the cause of action; and if any writ or process shall issue for the said sum of 10*l.*, or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff shall not proceed to arrest the body of the defendant. The statute 7 & 8 *Geo.* 4, c. 71, s. 1, makes the proceedings and judgments had on

point it is clear that there ought to have been a conclusion to the plea.

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 SNOW
 v.
 STEVENS.

ALDERSON, B.—The words of the statute 12 *Geo.* 1, are, “That if, after the 24th *June*, 1726, any writ or process shall issue for the sum of 10*l.* or upwards, and no affidavit shall be *made* as aforesaid, the plaintiff shall not proceed,” &c. The statute does not say “made and filed.” To have raised the question upon this act, the defendant ought to have averred that there was no affidavit *made*. The plea is also bad as wanting a conclusion.

The rest of the Court concurring, there was—

Judgment for the plaintiff (a).

AN application for leave to amend was afterwards made without success.

(a) 1 C., M., & R. 26, S. C.

PERRY v. PATCHETT.

THIS was an action to recover the value of a stack of hay sold by the defendant to the plaintiff, and which it appeared the plaintiff was to be entitled, according to the contract, to keep on the defendant's premises for a certain time. Before the expiration of that time, the hay was seized and sold under a distress for rent. A rule *nisi* was afterwards obtained to set aside the writ of summons, issued by the plaintiff, on the ground that the amount of debt and costs claimed by the plaintiff was not indorsed on the process, pursuant to the directions of 2 *Reg. Gen. H. T.* 2 *Will.* 4, extended by 5 *Reg. Gen. M. T.* 3 *Will.* 4 (a).

If a plaintiff claims both money and damages, he need not indorse the amount of his claim on the process.

(a) *Ante*, Vol. 1, pp. 198, 471.

CASES ON POINTS OF PRACTICE, EXCH.

Whately shewed cause against this rule, and contended, that, as the plaintiff's demand consisted of both money and damages, it was not necessary to make the indorsement directed by the rules in question. He cited *Curwin v. Mosely* (a), where it was held, that, in order to set aside process on the ground of the indorsement not being made, it must also appear that the cause of action was debt.

R. V. Richards, in support of the rule, contended that the cause of action here was substantially for a debt, and therefore that the indorsement was required.

The Court held, that, as the plaintiff was entitled to damages as well as the value of the hay, the case was not within the rule.

Rule discharged, with costs (b).

Dowl's Practice, 48.

Rule discharged, with costs (b).

(a) *Ante*, Vol. 1, p. 432. See also Dowl.'s Practice, 48.
(b) 1 C., M., & R. 29, S. C.

(b) 1 C., M., & R. 29, S. C.

ATTORNEY-GENERAL v. CLEAVE.

ATTORNEY-GENERAL v. CLEAVE.

1834.

PHILPOT *v.* ASLETT.

IN this case, it appeared that, in the year 1831, the defendant was indebted to the plaintiff, and afterwards took the benefit of the Insolvent Act. Some time after he was discharged he contracted a new debt with the plaintiff, and for the amount of it and the old debt he gave a bill of exchange. On the face of the bill it did not appear whether it was given for the old or the new debt, but payments were made generally by the defendant sufficient to liquidate the new debt. An action was afterwards brought on the bill of exchange, which the defendant did not defend, but gave a warrant of attorney for the amount of it, and of the debt and costs. Judgment was afterwards entered up on this warrant of attorney.

If a defendant gives a bill of exchange for a debt, from which he has been discharged by the Insolvent Act, and an action is brought on that bill, he must plead his discharge; and if he gives a warrant of attorney to secure the payment, the Court will not set it aside.

Platt applied for a rule *nisi* to set aside the judgment so signed, on the ground of its having been given for a debt from which, pursuant to the 7 *Geo.* 4, c. 57, s. 61, he was discharged.

Tomlinson shewed cause in the first instance.—When the plaintiff declared on the bill of exchange, if the defendant disputed his liability on the ground of his discharge under the Insolvent Act, he ought to have pleaded that discharge. The present application, therefore, was too late.

The Court thought, that, as the action had been brought *bonâ fide* on the bill, and the defendant had had an opportunity of pleading his discharge, but had not availed himself of it, it was too late for him now to apply for relief.

Rule discharged (*a*).

(*a*) See 1 C., M., & R. 669, S. C.

1834.

TREASURE'S Bail.

A notice of bail, describing there as of a parish merely is sufficient.

An affidavit of justification, giving the deponent's residence, without his addition is bad.

THE notice of bail did not mention any street or number of the house as the residence of the bail, but merely a parish.

Whitmore objected, that the rule required the number of the house to be given.

Greaves, contra, cited *Smith's Bail (a)*, where the name of a village was held sufficient.

ALDERSON, B.—There may be no street or number to the house. I think the description is sufficient.

Whitmore then objected to the affidavit of justification, that there was no addition given to the person who made the affidavit; he was merely described as “of the parish of *Bedwelly*, in the county of *Monmouth*.”

ALDERSON, B.—I think this is a fatal objection; but I will give time (*b*).

1834.

STREET v. CARTER.

THIS was a motion to set aside the service of the writ of *capias* for irregularity, and to cancel the bail-bond. The writ sued out was correct; but the copy served omitted the words "Sheriff of *Warwickshire*," and also what Court the defendant was to appear in.

If the copy of the writ served on the defendant is materially defective, it is a ground for discharging the defendant on common bail, though the writ itself is right.

Follett shewed cause.—He contended, that, because the copy did not agree with the writ in every particular, it was not a sufficient ground for discharging the defendant on common bail.

PARKE, B.—At chambers it has been always held that the plaintiff ought to give the defendant a true copy.

Rule absolute (a).

(a) See *Hodgkinson v. Hodgkinson*, ante, p. 535.

CLARKE v. WEBB and Another.

THE declaration in this action contained counts for use and occupation, for money had and received, and upon an account stated. Plea—the general issue. Upon the trial at the last *Surrey* Assizes, before Lord *Lyndhurst*, C. B., the facts appeared to be these:—*Lawrence*, the tenant of a house belonging to the plaintiff, became insolvent, and the defendants were appointed assignees of his estate. By their directions, certain fixtures belonging to *Lawrence* were removed from the premises, and sold; but the evidence did not establish any occupation by themselves. It was proved, however, that, in consideration of being allowed to remove the fixtures, they pro-

The assignees of an insolvent tenant, in consideration of being allowed to recover certain fixtures, agreed to pay to the landlord 7*l.* for the last quarter's rent:—*Held*, that the sum could not be recovered on the count upon an account stated, there having been no use and occupation by the defendants; and that the agreement

should have been declared on specially.

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CLARKE
v.
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mised to pay the plaintiff 7*l.* for the quarter's rent then due. The plaintiff claimed to recover this sum on the count on an account stated. The Chief Baron told the jury, that, if they thought the agreement proved, they had better find for the plaintiff; and a verdict was accordingly found for the plaintiff, damages 7*l.* His Lordship having given leave to the defendants to move to set aside the verdict for the plaintiff, and to enter a non-suit, a rule for that purpose was obtained.

Platt shewed cause.—Where a special agreement has been executed, it is not necessary to declare upon it; but *indebitatus assumpsit* may be maintained upon the duty arising out of the performance of the special contract. Here the rent had become due, and the occupation was complete, and it was not necessary to call in the assistance of the stat. 11 *Geo. 2.* There was an agreement to pay 7*l.* By virtue of that agreement the money had become due, and might be recovered under the account stated.

Lord LYNDHURST, C. B., was of opinion, that the promise was a distinct and separate contract to pay 7*l.*; and

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SMITH *v.* TOWER.

HEATON moved that the defendant's late attorney might answer the matters of an affidavit. The principal ground of complaint was, that the defendant, having applied to the Insolvent Court for his discharge, and employed the attorney to carry him through, he was remanded by that Court for misappropriation, in handing over money to the attorney by his advice, and upon his assurance that there was nothing wrong in so doing. There were other causes of complaint, but not made out with sufficient particularity.

It was held to be no ground for making an application against an attorney, that he had advised his client to hand him over money which the Insolvent Debtors' Court, on the client's application there for his discharge, considered a misappropriation, and for which he was remanded by that Court.

Per Curiam.—We think there are not sufficient grounds laid for the application.

Rule refused.

STUNELL *v.* TOWER.

R. V. RICHARDS had obtained a rule to shew cause why an attachment should not issue for the non-payment of costs, pursuant to the Master's *allocatur*; and why the service of the *allocatur* should not be deemed good service. It appeared from the affidavits, that there had been no personal demand from the defendant; but that the person who went to the defendant's house to serve him with the *allocatur* could not get to see him, though he heard his voice in the passage; and ultimately he served the *allocatur* on the daughter in the house, and she promised to give it to her father. It was sworn, that the defendant, who lived at *Lincoln*, could not be personally served.

An attachment for non-payment of costs can only be granted on an affidavit of personal service.

Heaton now shewed cause, and contended, that nothing but a personal service was sufficient in such a case.

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R. V. Richards was heard in support of the rule, and cited *Green v. Prosser* (a).

LORD LYNTHURST, C. B.—The hearing the party's voice in the house carries the case no farther than this, that he was at home when the daughter was served with the *allocatur*; and the question is, whether a service on the daughter is sufficient? This rule ought not to have been granted. A demand upon the daughter is no demand at all. It is much better in cases of this kind to adhere to the general rule, that personal service should be required: His Lordship added, that the Court was more anxious to lay down this rule, as the case cited might be supposed to authorize a less strict practice.

The other Barons concurring—

The rule was discharged without costs (b).

(a) *Ante*, p. 99.

Love, 4 B. & Ald. 412, and *Allier*

(b) See the cases of *Ex parte* v. *Newton*, *ante*, p. 582.

pleas were irregularly pleaded; first, as being out of time; secondly, because there was no rule to plead several matters; and, thirdly, because they were not signed. The pleas were, first, that the defendant did not promise; and, secondly, that he had paid the money claimed in the declaration, concluding with a verification: the last plea, therefore, required to be signed; and one of several pleas being bad, it makes all bad. An order for seven days' time to plead was obtained on the 15th of *May*, and the plea was not delivered till the 22nd, and judgment was not signed till the opening of the office on the evening of that day. The judgment was therefore regular, the plea being out of time, according to *Kay, one &c., v. Whitehead(a)*, where it was held, that the time to plead under a Judge's order is reckoned inclusively of the day of the date of the order, but exclusively of the day on which it expires; and *Gould, J.*, cited a case of *Read v. Montgomery*, where an order for time to plead was made on the 16th of *May*, and the judgment was signed on the 23rd for want of a plea; and the Court, on consulting the officers, held it to be regular (b).

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BURRELL.

Follett, in support of the pleas.—The seven days are to be reckoned excluding the first day and including the last (c); a plea on the 22nd was therefore in time; but even if the pleas are clearly irregular, the judgment is not regular, because it was signed too soon: the plaintiff had no right to sign judgment till the

(a) 2 H. Bla. 35.

(b) In the note to that case, however, there is a reference to *Freeman v. Jackson*, 1 Bos. & Pul. 480, *contra*.

(c) By the late rule of *H. T.* 2 Will. 4, r. 8, "In all cases in which

any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day." *Ante*, Vol. 1, p. 200.

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23rd, as the defendant had the whole of the 22nd for pleading.

Hutchinson, contra, contended, that, by delivering the pleas, the defendant waived the remainder of the time, if he was entitled to any.

Follett.—He might waive the further time for the purpose of going on, but not to authorize the plaintiff to sign judgment.

Lord LYNDHURST, C. B.—The defendant had the whole of the 22nd for pleading; he might, therefore, during that day have delivered a good plea, but by signing judgment he was prevented from so doing: the judgment was therefore signed too soon, and must be set aside.

ALDERSON, B.—The defendant might have cured the irregularity of his pleas if judgment had not been signed.

Rule absolute.



RAVENSCROFT v. WISE, ANDERSON, D. S. WYLIE, and
S. WYLIE.

f. indebitatus assumpsit, to recover
to the plain-

a contract signed "*Anderson, Wise, & Co.*" This was proved to be in the handwriting of the defendant *Wise*. In this agreement the terms on which the plaintiff was to command the *India* were set forth, and the plaintiff also proved that he had commanded that vessel for several years. The rule for paying 61*l.* into Court was then put in. This was the plaintiff's case; and it was contended, on the part of the defendant, that no *prima facie* case was made out, and that therefore a nonsuit must take place. The learned Judge, however, would not stop the case, and evidence was then given by the defendants that *D. S. Wylie* was not a partner when the contract was made, or at any subsequent period; nor was he an owner, for his name had not appeared on the register for a considerable time before the vessel was placed under the command of the plaintiff. Other evidence was also given as to the ship's accounts. The parties ultimately agreed to refer the accounts to an arbitrator, leave being reserved to the plaintiff to move to enter a nonsuit. A rule *nisi* was afterwards obtained for that purpose.

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 RAVENSCROFT
 v.
 WISE.

Crompton and *Lloyd* shewed cause against this rule, and contended that the evidence adduced by the plaintiff was sufficient to charge the defendants as liable under the joint contract alleged in the declaration. The rule was, that payment of money into Court admitted conclusively every thing which the plaintiff would have been bound to prove in order to recover the sum paid in. The form of action could make no difference, if there were only one entire contract to which the payment could be referred. Where indeed the plaintiff sought to charge defendants as to different items on different contracts, and money was paid into Court as to some items, that was no admission as to the others, and, therefore, the defendant was not estopped from disputing them. So, also, some of the late cases

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would seem to shew that a payment into Court on the *indebitatus* counts had a different effect from such a payment on a count founded on a special contract. In all those cases, however, on examination it would be found that the contract was divisible. With respect to the evidence adduced on the part of the defendant, it could not affect the case, as the payment into Court was conclusive on the defendants. They cited *Walker v. Rawson* (a), *Long v. Greville* (b), *Meagher v. Smith* (c), *Bulwer v. Horne* (d).

John Evans and *John Jervis* supported the rule, and contended, that, where only some of the defendants had entered into a contract, they could not by a payment into Court conclude the others as to an alleged contract. Should such a rule be allowed to prevail, defendants might be charged on contracts into which they had never entered, because one of them had so done and paid in money on account of them. Such a payment into Court generally could only be considered as an admission of the defendant's liability to that extent. It was in the nature of a payment before action brought, and only concluded the defendants to that extent. They cited *Tidd's Practice* (e), *Blackburn v. Scholes* (f).

Lord LYNTHURST, C. B.—There is this difference between a payment before action brought and a payment into Court, that the former may be considered as *prima facie* evidence of the case.

here, there was only one original contract which binds all together. If, therefore, one was bound to pay under this contract, all were so bound, because they have jointly paid money into Court, since none of them are liable except on this contract.

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RAVENSCROFT
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BOLLAND, B.—I am of opinion, that the defendants by making this payment into Court have admitted themselves to be parties to the contract alleged in the declaration. The rule for entering a nonsuit must be discharged.

ALDERSON, B.—Where the declaration alleges a contract generally, and it is proved that there was but one contract, the parties are placed in the same situation as if the contract were specially stated on the face of the declaration. If the defendants pay money into Court, they admit the contract, although they may still prove that they are not liable beyond the sum which they have paid into Court. Here it was shewn, that only one contract existed, and to that only, therefore, could the payment be referred. The defendants may adduce evidence to limit their liability to the amount paid in, but by the payment they have admitted the contract.

GURNEY, B., concurred.

Rule discharged(a).

(a) See 1 C., M., & R. 203, S. C.

1834.

It is not a ground of special demurrer that a venue is inserted in a pleading, contrary to the late rules in pleading.

HARPER v. CHUMNEYS.

THIS was a special demurrer to a declaration for putting in a venue.

Chandless was called on by the Court to support the demurrer.—The new rules of *H. T. 4 Will. 4*, are declared to be of the like force and effect as an act of Parliament. Rule 8 (*a*) expressly provides, that no venue shall be stated in the body of the declaration, or in any subsequent pleading. It is as if, therefore, a special form had been given by act of Parliament, with a prohibition against using any other form. The declaration is therefore informal in inserting a venue, and is liable to be demurred to for this as for any other informality. There is a proviso attached to the rule, “That in all cases where local description is now required, such local description shall be given.” It has been occasionally disputed what is matter of local description, and what not. A party may wish to have the opinion of the highest tribunal in the country, which he could only get upon demurrer: he ought not, therefore, to be deprived of his right to demur, without a special provision to that effect.

of the objection is, to apply to a Judge at chambers to strike out the venue.

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HARPER
v.
CHUMNEYS.

No counsel appeared for the plaintiff.

Judgment for the plaintiff.

—
In *Neill v. Davis*, the same point arose. *George*, for the demurrer, declining to argue the point after the former case was disposed of, the Court allowed an amendment at his instance, the costs to be costs in the cause.

—◆—
SIGGERS v. LEWIS.

THIS was an action of *assumpsit* on a bill of exchange, by the indorsee against the indorser. The defendant pleaded that the plaintiff commenced his suit before a reasonable time had elapsed after notice of the dishonour of the bill. The plaintiff demurred.

It is no defence to an action against an indorser, that it was commenced before a reasonable time had elapsed after notice of the dishonour; the only remedy the defendant has is to apply to the Court to stay proceedings on payment of costs.

Mansel appeared in support of the demurrer; but the Court called upon—

Chandless to support the plea. The plea was drawn on the authority of the case of *Walker v. Barnes* (a), in which it was held that the drawer of a bill is only bound to pay within a reasonable time after receiving notice of its being dishonoured. That case is distinguishable from *Hume v. Peplue* (b), where a plea of tender after the cause of action had accrued was held too late. The question is, whether the cause of action can be said to have accrued till the lapse of a reasonable time after notice.

(a) Marshall, 37.

(b) 8 East, 168.

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SIGGERS
v.
LEWIS.

ALDERSON, B.—According to your argument, the declaration ought to have averred that a reasonable time had elapsed after the notice.

Chandless.—It is matter of excuse, and is therefore properly shewn in pleading by the defendant.

Lord LYNDHURST, C. B.—The case referred to, of *Walker v. Barnes*, was, where a tender had been made before action brought; and the question was, whether it was in time. This is a different case. The drawer undertakes for the acceptor: no action can be brought till notice has been given to the drawer of the acceptor's default; but an action may be brought immediately upon notice being given. In this and many other cases, where the writ is sued out immediately, the only remedy is to apply to a Judge to stay proceedings on payment of costs.

ALDERSON, B.—In *Hume v. Peplue*, a tender after presentment was held to be too late. If you had a defence as tender or payment, you might have pleaded it as being done in a reasonable time. *Walker v. Barnes* is no more than this, that tender on notice is tender in a reasonable time.

1834.

DUNCAN v. GRANT.

WALESBY shewed cause against a rule obtained by *C. Jones* for a new trial, on the ground of the verdict being against evidence. The action was for 4*l.* 10*s.* The defendant claimed to set-off 3*l.* 16*s.*, and the difference was paid into Court. The pleas were, the general issue and the Statute of Limitations, with notice of set-off. It was objected at the trial, that the set-off ought to have been pleaded, and, the under-sheriff being of that opinion, a verdict passed for the plaintiff. It was now contended, on the authority of *Webber v. Venn* (a), that there being another plea besides the general issue, the defendant could not avail himself of the set-off without pleading it. In that case Lord *Tenterden* said—"It ought to be generally known, that where any plea is on the record besides the general issue, the set-off cannot, by the terms of the statute, be taken advantage of unless pleaded."

Where the general issue and the Statute of Limitations were pleaded, together with notice of set-off, it was held, that, under the 2 Geo. 2, c. 12, a set-off could not be given in evidence, but that it ought to have been pleaded.

C. Jones, in support of the rule, relied on *Coulson v. Jones* (b), where Lord *Ellenborough* held, that evidence of set-off might be given under a notice of set-off, though there were several pleas.

BOLLAND, B.—I think the rule should be discharged. The authorities are conflicting: but I think the opinion of Lord *Tenterden* is entitled to greater weight, as being more consistent with the words of the statute; and Lord *Tenterden* would not have made such a statement unless he had formed a deliberate opinion adverse to that of Lord *Ellenborough*.

(a) 1 Ryan & Moody, 413

(b) 6 Esp. 50

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DUNCAN
v.
GRANT.

ALDERSON, B.—I think it is better to adhere to the latest authority. The words of the act are (a) “Where there are mutual debts between the plaintiff and defendant, one debt may be set off against another, and such matter given in evidence under the general issue, or pleaded in bar; but, if intended to be given in evidence under the general issue, notice must be given of the particular sum intended to be set off, and on what account it has become due.” The fair meaning of the clause is, that where there is no special pleading the set-off may be given in evidence upon a notice, otherwise it must be pleaded. I think Lord *Tenterden’s* opinion is the better founded of the two.

GURNEY, B.—I am of the same opinion.

Rule discharged.

(a) 2 Geo. 2, c. 12.

PHILLIPPS v. ENSELL.

Comyn, amicus curiæ, cited *Thomson v. Phenev* (a), where, in a similar case, Mr. Justice *Patteson* held, that the service must be personal to entitle the plaintiff to file common bail.

1834.
PHILLIPPS
v.
ENSELL.

Addison.—The other objection is, that, if there was a service of the writ, the declaration was served too early, the service of the writ being on the 23rd, and the declaration on the 31st of *May*.

A rule *nisi* having been granted, *Hutchinson* shewed cause, on the defendant's affidavits. It is wished to be inferred, from the affidavit of the defendant's brother, that the defendant himself never was served. The brother swears that the writ was served on him, and not on his brother. The defendant swears that he was not served with any process or copy till the notice of declaration. He does not deny that it has come to his hands, or that he had notice of it. They both live together; and the brother does not say he did not communicate it to the defendant. That was on the 20th. On the 23rd, the brother swears he was again served with a copy of the summons by the same person; but he does not say, that that did not come to the defendant's knowledge. If it can be supposed, that the writ came to the defendant's knowledge, that is sufficient, under the circumstances, to warrant an affidavit of personal service, according to *Rhodes v. Innes* (b). It must be presumed, therefore, that there was a service on the 20th; and the declaration on the 31st is regular.

Addison, in support of the rule.—In this case, it is quite clear that there was no personal service, for the brother positively swears that he received the writ, and sent it

(a) 1 Dowl. P. C. 441.

(b) 5 M. & P. 153; 7 Bing. 329; 1 Dowl. P. C. 216.

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back by the two-penny post. In *Thompson v. Phenev*, the service was as much upon the defendant as it is here: the defendant there was in an inner room, within hearing of what was going on in the shop. *Rhodes v. Innes* was cited in *Thompson v. Phenev*; but, in the former case, the son said he would give the process to his father. Secondly, the service of the declaration was too early; for, after the supposed service on the 20th, there was another service on the 23rd. The defendant is sworn to have been in bed at the time.

BOLLAND, B.—I spoke to Mr. Justice *Patteson* about *Thompson v. Phenev*, and he said, he did not determine what particular service was sufficient. That case does not impugn the case of *Rhodes v. Innes*; and, on the authority of the latter case, I think this rule should be discharged.

ALDERSON, B.—In this case, it appears that the writ was not delivered personally to the defendant; but, for any thing that appears, it may have come to the defendant's hands. In *Thompson v. Phenev*, Mr. Justice *Patteson* reprobates the practice of making special affidavits: here it must be presumed, that the affidavit of service was in the usual form; and, therefore, there is no objection.

1834.

RUSH v. SMITH.

THIS was an action of trespass, for seizing certain property belonging to the plaintiff. The defendant pleaded not guilty. The cause was tried before *Vaughan, B.*, at the *Lent* Assizes for the county of *Suffolk*. The plaintiff called the officer, who had made the distress, to produce the warrant. By inadvertence he was sworn, and asked this question—"Were you employed as bailiff, and had you any warrant?" The witness gave no answer. It was then contended, that the counsel for the defendant had a right to cross-examine the witness, he having been sworn. The learned Judge was of opinion, that, as the witness had not been examined, the defendant had no right to cross-examine him. The plaintiff had a verdict; and a rule *nisi* for a new trial was afterwards obtained on the ground of the defendant being improperly prevented from cross-examining the witness.

A witness merely called to produce a document, although sworn, and asked a question, but which he does not answer, is not liable to cross-examination.

Austin shewed cause against this rule.

Storks, Serjt., and *B. Andrews*, supported it. They admitted, that, if the witness had not been sworn, he would not have been liable to cross-examination; but, in the present case, he had been sworn, and actually examined. The fact of his having given no answer to the question put could make no difference. In the case of *Phillips v. Eamer and Another (a)*, where a witness was sworn, but not examined, Lord *Kenyon* decided, that, as he had been called, the opposite party had a right to cross-examine him.

ALDERSON, B.—It is now the settled practice, that, if a

(a) 1 Esp. N. P. C. 357.

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witness is called under the authority of a *subpœna duces tecum* to produce certain documents, which he is bound to produce, and is not examined, but the documents are identified by other evidence, the opposite party has no right to cross-examine him. In conformity with that rule, I decided in a case at *Carlisle*. In the present instance, the witness was only called to produce the warrant. The present rule must, therefore, be discharged.

GURNEY, B., concurred.

Rule discharged (a).

(a) This case is also reported in *Evans* q. t. v. *Mosley*, Esq., *ante*, 1 C., M., & R. 94. See further, p. 364.

PAYETT v. HILL.

Service of a rule nisi to compute at a house where the defendant's family were still living, though

THOMAS applied to the Court for leave to serve a rule nisi to compute, by leaving it at the late residence of the defendant. It appeared, that, upon applying at the house to serve the rule, some one said that the defendant had

1834.

CLEAVER *v.* HARGRAVE.

GREAVES had obtained a rule *nisi* for reviewing the Master's taxation, on the ground that, on the taxation of certain costs, the Master had refused to allow the costs of certain amendments in the record.

A motion to review the Master's taxation must be supported by an affidavit that the Master has made his *allocatur*.

R. V. Richards shewed cause.—He objected, that the affidavit in support of the motion did not shew that the Master had made his *allocatur*; it was expressly denied in his affidavit that any *allocatur* had been made. He contended that a taxation could not be reviewed till the Master had made his *allocatur*.

Greaves, in support of the rule.—The affidavit expressly states that the Master refused to allow us the costs we claim.

Per Curiam.—The rule must be discharged.

Rule discharged, with costs.

WEEDON *v.* MEDLEY.

HEATON moved to discharge the defendant out of custody, on account of a defect in the affidavit to hold to bail. The action was on a bill of exchange by the indorsee against the drawer. The affidavit, after stating the acceptance of the bill, proceeded thus:—"and which having become due is wholly unpaid." He contended, that it was necessary to shew the default of the acceptor, accord-

An affidavit of debt on a bill of exchange, in an action against the drawer, alleged that the bill having become due was wholly unpaid. On a motion to discharge the defendant out of

custody because the affidavit did not sufficiently shew a default by the acceptor, the Court refused to interfere.

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 v.
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ing to *Cross v. Morgan* (a), and *Banting v. Jadis* (b).
 The affidavit ought to have alleged a presentment, otherwise no default is shewn.

ALDERSON, B.—So the drawer is not liable without notice; but none of the forms state that.

BOLLAND, B.—None of the forms state any presentment for payment. The affidavit states that the bill has become due, and has not been paid.

ALDERSON, B.—Without some authority to shew that such an affidavit as the present is bad, we cannot grant the rule.

Rule refused.

(a) 1 Dowl. P. C. 122.

(b) Id. 445.

DOE d. GILLET v. ROE.

Ejectment is
 not within the
 rules of Hilary
 Term. 3 Will. 4.

MANSEL moved to set aside a declaration in ejectment on the ground of irregularity. *First*, because the declaration



statute 2 Will. 4, c. 39;" and that statute is intituled "An Act for the Uniformity of Process in *personal* actions in his Majesty's Courts of Law at *Westminster*;" and its provisions only extend to such actions. Ejectment is a mixed action; and the act does not therefore extend to it, and consequently the rule does not.

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DOE
d.
GILLETT
v.
ROE

Rule refused (a).

(a) S. C. 1 C., M., & R. 19.

SEABROOK v. CAVE.

HENDERSON shewed cause against a rule for judgment as in case of a nonsuit, on the ground that issue had not been joined. The declaration was in trespass, with pleas of the general issue and *molliter manus imposuit*. The plaintiff replied *de injuriâ* to the last plea, and added the *similiter* to the general issue, but there was no *similiter* to the replication of *de injuriâ*. The cause was not therefore at issue.

The Court will discharge the rule for judgment as in case of a nonsuit, though the defendant swears the cause is at issue, if the plaintiff swears that the *similiter* has not been added.

Austin, in support of the rule.—We positively swear that issue is joined. There was nothing to add but the *similiter*; and, by the rule of *Trinity Term*, 1 *Geo. 2*, the plaintiff may add the *similiter*, and make up the issue, when the defendant is not let in to allege any new matter, or, if the plaintiff neglects to do so, the defendant may do it himself. The inference, therefore, is, that the issue has been made up by the defendant, as he swears it is.

GURNEY, B. (a) —The cause is not at issue without a *similiter*.

Rule discharged.

(a) Sitting alone.

1834.

WOOD v. RAY.

"Gentleman" is a good description of a clerk in the Post Office.

The place where the affidavit of justification was sworn need not be mentioned.

BUSBY opposed the bail in this case, and objected to the notice of justification and the affidavit. No place was mentioned in the affidavit where it was sworn; and the copy was wrongly intitled *Thomas Wood v. George Alexander Ray*, the notice being *George Henry Ray*.

ALDERSON, B.(a)—The place not being mentioned is not material; and if the affidavit is irregular, you are entitled to costs as if there were no affidavit; but you are at liberty to examine him on the facts stated in the affidavit.

Busby then objected to his description. He was a clerk in the *Post Office*, and had described himself as a gentleman.

ALDERSON, B.—I think the description is sufficient.

Upon further examination, the bail, having admitted that he had taken the benefit of the Insolvent Act in 1832,

1834.

NICHOLLS v. CHAMBERS.

KELLY shewed cause against a rule which had been obtained by *Comyn*, for setting aside the judgment and all subsequent proceedings, with costs, for irregularity. The cause was tried before the under-sheriff, under the 3 & 4 Will. 4, c. 42. The jury process was returnable on the 23rd of May; the cause was tried on the 27th, by order of a Judge, and on the same day the costs were taxed, and judgment signed. He contended, that, upon the construction of the 18th clause (a), the judgment was regular. He also referred to rule 67 of *H. T. 2 Will. 4*.

Upon a trial under the 3 & 4 Will. 4, c. 42, the plaintiff, having obtained a verdict, got his costs taxed, and signed judgment on the same day:—*Held*, upon the construction of section 18, that the judgment was regular.

Comyn, in support of the rule, contended, that the latter part of the clause, which gave only the like force and effect to a verdict under that act as a verdict at *Nisi Prius*, prevented the plaintiff from taxing costs and signing judgment sooner than a plaintiff could do upon a verdict at *Nisi Prius*, who in such case could not have costs taxed till after four days in term, when the plaintiff might move for judgment, and the defendant might move in arrest of judgment. If this had been a trial in vacation under the 1 Will. 4, c. 7, the plaintiff might have applied for immediate execution; but then he must have given up

(a) Which enacts, "That, at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, before whom such writ of inquiry may be executed, or such sheriff, deputy, or Judge before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not

to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury, on the trial of such issue or issues, shall be as valid and of the like force as a verdict of a jury at *Nisi Prius*.

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the costs. But, according to the usual practice upon trials at *Nisi Prius*, costs cannot be taxed immediately.

BOLLAND, B.—I think the rule should be discharged; and that, upon the construction of the 18th clause, the plaintiff may have his costs taxed immediately.

ALDERSON, B.—I am of opinion that the plaintiff is entitled to his judgment as soon as he can get his costs taxed.

Rule discharged, with costs.

MARTIN v. COLVILL.

Where, on account of the defendant's residence being unknown, the Court gives leave to serve him in a particular manner, they will not make a prospective rule that service of

C. CRESSWELL moved that service of the declaration might be good service by leaving it at the last place of residence of the defendant, and also sticking it up in the *Exchequer Office*. The summons had been personally served, but the defendant had removed when the declaration was taken to be served. He also applied that the rule might be drawn up so as that service of the present and future

1834.

MUDAY v. NEWMAN.

BELDAM shewed cause against a rule for judgment as in case of a nonsuit, upon an affidavit of the plaintiff that he never knew of the action till the rule was served; an attorney of the name of *Penallow* had sued in the plaintiff's name. The rule had been enlarged from last term to enable the plaintiff to find *Penallow*, but he had been unable to do so.

It is no answer to a motion for judgment as in case of a nonsuit, that the action was commenced and carried on by an attorney without the authority of the plaintiff; but the proper remedy for the latter is against the attorney.

PARKE, B.—I fear your only remedy is against *Penallow*. You may have the rule enlarged to the last day but one of the term, and you may take a rule *nisi* why *Penallow* should not pay the costs, upon an affidavit that you never instructed the attorney (a).

(a) See *Souler v. Watts*, ante, p. 263.

MESTAYER v. BIGGS.

THIS was an action on a bond conditioned for the payment to the plaintiff of an annuity. Plea—*non est factum*, and issue thereon, upon which the plaintiff obtained a verdict.

In an action on a bond conditioned for the payment of an annuity, an objection, that the bond was not inrolled as it ought to have been, cannot be taken advantage of under the plea of *non est factum*, but must be pleaded.

Mansel having obtained a rule *nisi* for a nonsuit on two points reserved at the trial: first, that the bond required enrolment under the provisions of the Annuity Act; and, secondly, that the stamp, which was a common deed stamp of 1*l.* 15*s.*, was insufficient.

Cowling shewed cause, and contended, that such an objection could not be taken upon the plea of *non est fac-*

1834.
MESTAYER
v.
BIGGS.

tum, but should have been pleaded. He argued at great length against the validity of the objection taken at the trial.

Mansel, in support of the rule, cited *Hill v. The Manchester and Salford Water-Works Company* (a), as an authority that the objection as to the inrolment was admissible under *non est factum*, and endeavoured to support the rule upon both grounds.

PARKE, B.—I am of opinion that there is no foundation for either of the objections, and that the want of an inrolment (if it were necessary) could not be urged as an objection on the plea of *non est factum*. It is a general rule that statutory objections must be pleaded. *Hill v. The Manchester and Salford Water Works Company* was an entirely different case; the defendant there endeavoured to shew that the seal was not the seal of the company. The rule must therefore be discharged.

The other Barons concurred.

Rule discharged.

(a) 2 Nev. & Manning, 573.

day notice was given of a writ of inquiry, to be executed on the 23rd. The motion was not made till the latter day. The action was for a bill of costs. It was contended, that the motion was too late. The Court overruled this objection. It was then contended, that the plea being pleaded by an attorney different from the one who had before acted in the cause for the defendant, entitled the plaintiff to treat the plea as a nullity. It was also denied that he was an attorney. But the Court intimated that that motion had better be referred to the Master. The Master, on reference, found that *Eley* had pleaded in the name of *Cole*, without a written authority; but that the plaintiff ought not to have treated the plea as a nullity; and the judgment was accordingly set aside, without costs.

1834.
HILL
v.
MILLS.

The Court made the rule absolute, with costs; the defendant to take short notice of trial.

ASHLEY v. FLAXMAN.

GURNEY shewed cause against a rule which had been obtained by *Erle*, for judgment as in case of a nonsuit. The plaintiff had been nonsuited, but the nonsuit was set aside on payment of costs. The costs had since been paid. He cited *King v. Pippett*(a), and *Mewburn v. Langley*(b), to shew that the defendant could not move for judgment as in case of a nonsuit, after the cause had been once taken down to trial.

Where a plaintiff was nonsuited, and the nonsuit was afterwards set aside on payment of costs:—*Held*, that the defendant could not afterwards move for judgment as in case of a nonsuit, but must take the cause down by proviso.

Per Curiam.—The proper course for the defendant is to take the cause down by proviso. The rule must be discharged.

Rule discharged.

(a) 1 T. R. 492.

(b) 3 T. R. 1.

1834.

JONES v. ROBERTS and Another.

A plea was allowed to be amended after the plaintiff had replied, and the cause was in the paper, under special circumstances.

LLOYD moved for judgment for the plaintiff on a replication of *nul tiel* record. The defendants were sued as executors, and pleaded a judgment recovered for 30*l.* in the Court of Great Sessions of *Denbigh*. The plaintiff replied *nul tiel* record.

J. Jervis applied for leave to amend, by striking out the allegation of the judgment; for, upon inquiry, it was found that there had been judgment by default, but it was only entered in the books of the Court, and was not entered of record; and since the act of 11 *Geo. 4* & 1 *Will. 4*, c. 70, no one having power to draw up the record, it has become impossible to produce it. The plaintiffs replied at first that the judgment was kept on foot by fraud; and on rejoinder to that replication there was a demurrer, which was argued, and the Court gave time to amend (*a*). The defendants have now pleaded *nul tiel* record.

Lloyd, contra, opposed the application, contending that he was entitled to judgment, no record being produced; and the lapse of time was a sufficient objection to the re-

1834.

BOHRS v. SESSIONS.

KNOWLES shewed cause against a rule which had been obtained by *Channell*, for changing the venue in this action from *Middlesex* to *Essex*. He contended that the application was too early, being before plea. He relied upon *Weatherby v. Goring* (a), where, in an action of covenant, a similar motion being made before plea, the Court held that the motion was made too soon. In that case, it was said, that, until issue has been joined, the Court cannot tell whether the defendant intends to set up any defence to the action; and he cannot be entitled to change the venue in an action on a specialty unless it appears clearly that he will have some witnesses to examine on the trial of the cause. The present is an action of covenant, and the same objection applies; for, until the defendant has pleaded, it is impossible to predict what questions will be raised.

In covenant on a farming lease of land in *Essex*, for breaches of covenants relating to the cultivation of the land, the Court refused to allow the venue to be changed from *Middlesex* to *Essex* before plea pleaded.

Channell, in support of the rule.—The motion was made on an affidavit of special circumstances. The rule is drawn up on reading the declaration; and from that it appears, that the action is brought for breaches of very special covenants in a farming lease of land in *Essex*. It would lead to extreme inconvenience, in many cases, if such a motion could not be made, under special circumstances, before plea; for, perhaps, there may be judgment by default, and then there must be an assessment by a jury, which ought properly to come from the county where the land is. In the case cited, the deed was an indenture of apprenticeship; and it was moved on the ground of the witnesses residing in a different county. In that case, there was no affidavit of merits, and it did not appear there were any witnesses to examine.

(a) 5 Dowl. & Ryl. 541; 3 B. & C. 552.

1834.
 BOHRS
 v.
 SESSIONS.

LORD LYNDHURST, C. B.—It is impossible we can know the defence until it is pleaded. Suppose a release was pleaded. It is always inconvenient not to abide by a general rule.

ALDERSON, B.—Why should we go out of a plain, simple rule? *Non constat* that you plead these matters upon which you rely in your affidavit. The rule must be discharged.

Rule discharged, with costs.



HOCKLEY v. SUTTON.

To a declaration on a bill of exchange with the common counts, the defendant pleaded that the bill of exchange in the first count mentioned was paid when due; and also, as to the first count, that he did not promise; and as to the other

THIS was a motion to set aside an interlocutory judgment, which had been signed as for want of a plea, there being several pleas, and no rule to plead double, and no signatures of counsel. The declaration was on a bill of exchange, with the common counts. The defendant pleaded, as to the first count, that the bill was duly paid; *secondly*, that he did not promise as in the first count is alleged; and, as to the second and subsequent counts, he put himself upon the country.

have been a repleader. The last plea puts in issue nothing; it merely says, the defendant puts himself upon the country; and, therefore, no signature was necessary: and there being one good plea to the first count, the judgment signed upon the whole declaration is irregular.

1834.
HOCKLEY
v.
SUTTON.

LORD LYNTHURST, C. B.—The Court would not have treated them as pleas, if you had not; but if you plead several matters, one of which is of such a nature that the Court would not have granted you a rule, that does not make them the less several pleas.

ALDERSON, B.—Can you say, that your second and third pleas are so bad, that they are no pleas at all?—or, do you contend, that two irregularities make one regularity?

Petersdorff, who shewed cause, then objected to the affidavit of merits, on which also the rule was obtained, as not being sufficiently positive. It was in this form:—“*J. W.*, of &c., saith, that, as far as his knowledge extends, the defendant is ready to go to trial, and that he has a good defence on the merits.”

The Court required a more precise affidavit to be produced, which was done; and the rule was then made absolute on payment of costs.

Rule absolute.

1834.

NEALE v. M'KENZIE.

A special plea of justification, besides the general issue, will not now be allowed, where the special matter may, by statute, be given in evidence under the latter plea.

TRESPASS for breaking and entering the defendant's dwelling-house, and seizing and detaining his goods.

A rule *nisi* to plead several matters, *viz.* not guilty, and a justification for entering as landlord to distrain for rent in arrear having been obtained—

Comyn shewed cause.—The 11 *Geo. 2*, c. 19, s. 21, empowered the defendant to prove his special matter of defence under the general issue; and the right so to do was specially saved by the pleading rules of *Hilary Term, 4 Will. 4* (a). By the same rules (b), “pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed.” Here, both pleas must be founded on the same subject-matter, and therefore, their introduction was inconsistent with the rule.

Chasby, contra, submitted, that the new rules made no difference in the case; and, as before they were promulgated the defendant had a right to plead the general issue

which may always confine a defendant to the plea of the general issue, if it thinks right. The defendant must make his election, and for that purpose he may take twenty-four hours.

1834.
NEALE
v.
M'KENZIE.

BOLLAND, B., ALDERSON, B., and GURNEY, B., concurred.

Rule discharged, without costs (a).

(a) See 1 C., M., & R. 705, S. C.

STOKES v. WHITE.

THIS was an action on the case for wrongfully arresting the plaintiff, he being at the time an attorney, and also attending as a witness. The defendant, who was also an attorney, had arrested the plaintiff on a *capias* of privilege out of the *Exchequer of Pleas*, for a demand for business done for him as a clerk in court. The plaintiff had applied to *Littledale, J.*, at Chambers, and obtained his discharge, on the ground that he was attending as a witness on a trial under a subpoena at the time of the arrest. There was a verdict for plaintiff with 1*s.* damages, with leave for the defendant to move to enter a nonsuit or in arrest of judgment; and a rule *nisi* having been accordingly obtained by *Talfourd, Serjt.*—

By the act of 11 Geo. 4 & 1 Will. 4, c. 70, s. 10, which opened the Court of *Exchequer* to all attorneys, and gave them leave to practise there without employing clerks in court, the privileges of the sworn and side clerks are not abolished; and therefore they may still arrest other attorneys who become indebted to them, in the same way as they did before.

Kelly shewed cause, and contended, *first*, that an action would lie wherever a plaintiff wrongfully arrested a defendant, although he might not know that the party was protected at the time of the arrest; *secondly*, that at all events the refusal to discharge a party, and opposing his discharge before a Judge, after knowledge of the illegality of the arrest, rendered the plaintiff liable to a special action

1834.

STOKES
v.
WHITE.

on the case, for the subsequent detention and expense of putting in bail; *thirdly*, that, if both these failed, the defendant in this particular case was not justified in arresting the plaintiff, and that he was liable in damages for so doing. The argument, however, turned principally upon the third point, and upon the construction of the recent act of Parliament opening the Court of *Exchequer*. By a privilege from time immemorial the attornies and side clerks of the Court of *Exchequer* could hold attornies of any of the other Courts to bail for fees and disbursements incurred as clerks in court, and such attornies could not plead their privilege. This had been decided by several cases, but was applicable solely to the officers of this Court. It was argued, that, by the act of 11 *Geo. 4* & 1 *Will. 4*, c. 70, by which the Court was thrown open, the sworn and side clerks were abolished. In the present case, though the original writ which was first sued out issued before the act passed, the *alias*, on which the plaintiff was actually arrested, was issued some days afterwards, viz. on August 18th, the act having come into effect on the 18th; which was, therefore, he contended, after the privilege had ceased; and, as the defendant must have known it, the arrest was malicious.

supposed constant attendance on the Court performing, the duties of their offices. These offices being abolished, or the duties no longer to be performed, the privilege ceases with them.

1834.
STOKES
v.
WHITE.

LORD LYNDBURST, C.B.—There is nothing in the act, as I conceive, to alter their privileges. That act does not abolish either the sworn clerks or the side clerks. It recites that the business had much increased of late, and how it had been done; and to facilitate the future transactions of the business of the office, it goes on to enact that, in future, the duties shall be done by certain newly-created officers. The old officers exist, though the duties are transferred. The sworn clerks still exist, and so do the side clerks. A side clerk was not obliged to be admitted to enable him to practise. They may practise as they did before: this is one privilege clearly existing.

PARKE, B.—By the act of 1830, the side clerks are recognised as existing, and they may still practise as they did before. Some, I understand, have been admitted at-tornies, but others remain as side clerks, and Mr. *White* is one.

Kelly.—They could only practise in the names of the sworn clerks of the division, not in their own names. Mr. *White* was side clerk to Mr. ——. He practised before the act in the name of the sworn clerk. By the act, the sworn clerks are to do the whole duties, and are not to practise. How then could Mr. *White* continue to practise under the former privilege? The privilege was derivative *through* the attorney or sworn clerk, and they having ceased to practise, the privilege must cease with them. The only question is, as this was an action commenced before the act, and continued afterwards by *alias*, how it could have proceeded? I conceive it could not at all.

1834.

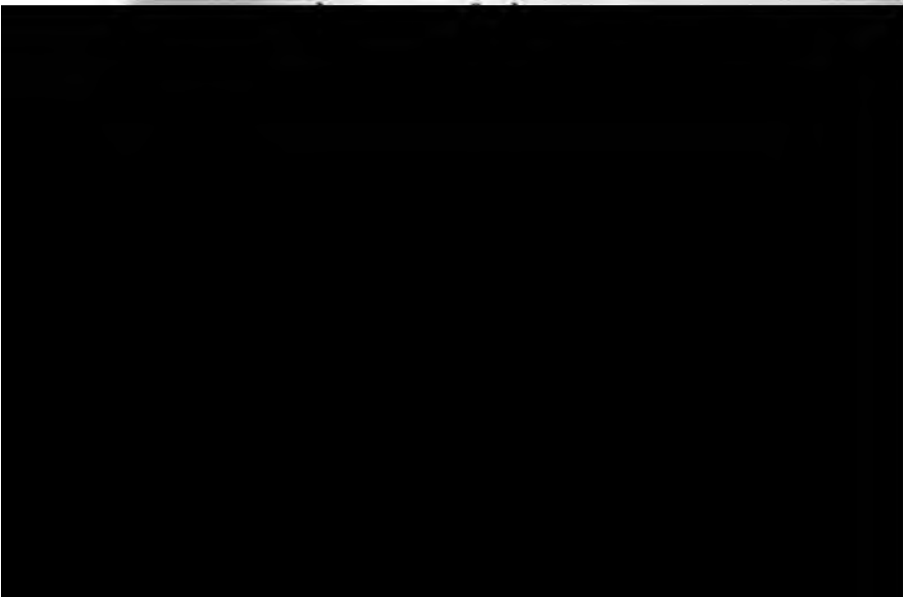
STOKES
v.
WHITE.

When the plaintiff came to declare, he must declare not in his own name, but in that of the attorney, whilst the act says the attorney shall not any longer practise.

LORD LYNDHURST, C. B.—It is quite clear from former acts as to side clerks, that they are not merely attornies. The act in question does not deprive them of their right to practise. The act says, that attornies of the other Courts shall be admitted before they are allowed to practise. It does not say that the side clerks are to be admitted. It never was intended to abolish them or to affect their rights to practise. And I know it was not the intention of the framers of the act to alter their privileges in any way.

PARKE, B.—It is quite clear that they are not abolished. If they cannot any longer practise in the names of the sworn clerks, they may now sue in their own names. When this process was sued out, it was necessary it should be sued out in the name of the attorney; but the clerks in court are now entitled to sue in their own names.

Kelly.—If I understand your Lordships to decide that the act does not abolish the sworn and side clerks, I will



1834.

GOULD v. RASPERRY.

THIS was a demurrer to a plea of discharge under the Insolvent Debtors' Act. In those parts of the plea which referred to the plaintiff's supposed causes of action, they were qualified by the words "if any."

A plea of a discharge under the Insolvent Debtors' Act was held bad, because it did not admit the existence of the cause of action.

Erle, in support of the demurrer, contended that the plea was bad, because it did not admit the existence of a cause of action; and a like case in the *King's Bench* was cited, where the same objection was held good.

Kelly, contra, cited several modern forms of pleas, in some of which the words "if any" occurred; in others, the word "supposed" was used. He argued, that the existence of the cause of action was sufficiently admitted for the purposes of the plea.

The Court took time to consider. On a subsequent day Lord *Lyndhurst* said, the Court had come to the same conclusion as the Court of *King's Bench* had, that the introduction of the words "if any" rendered the plea bad; but, as the *King's Bench* had given leave to amend, the defendant here, also, might amend, as there seemed to be some doubt about it.

Demurrer allowed.

BARKER v. WEEDON.

W. H. WATSON shewed cause against a rule which had been obtained by *Heaton*, for setting aside the writ for irregularity, and for discharging the defendant out of custody, with costs. The affidavit was to hold to bail for

A writ of *capias* directed to the "Sheriff of London," instead of "Sheriffs:"—*Held* bad on that account, and also because the words "indorsed

hereon" were omitted in the writ, which purported to have been issued in an action on the *case*.

1834.
BARKER
v.
WEEDON.

goods sold and delivered. The writ was to answer the plaintiff in an action on the case. Upon the face of the writ it appeared to be directed to the "Sheriff of *London*," instead of "Sheriffs;" and the words, "indorsed hereon," were omitted in the proper place.

ALDERSON, B.—Both objections are fatal.

PARKE, B.—The words, "on the case," do not import an action of *assumpsit*: the words in the act are, "on promises;" and in "case" there can be no arrest without a Judge's order.

Rule absolute accordingly (a).

(a) See *Nicoll v. Boyne*, *post*.

FIRLEY v. RALLET.

Where the arrest was on the 22nd of May:—*Held*, that it was too late, on June 4, to obtain the defendant's dis-

THIS was a motion calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, for a defect in the affidavit to hold to bail. The action was on a bill of exchange, and the affidavit merely

lay was, that there was a negotiation on foot, which was broken off, and this motion was made immediately afterwards. An application was made in the first instance to a Judge at Chambers. The objection to the affidavit was held to be fatal in two cases—*M^r Taggart v. Ellis* (a) and *Lewis v. Gompertz* (b).

1834.
FIRLEY
v.
RALLETT.

PARKE B.—The motion is too late.

Rule discharged.

(a) 12 Moore, 326; 4 Bingham, 114, S. C.

(b) 2 C. & J. 352; 1 Dowl. P. C. 319, S. C.

STEWART v. ABRAHAM.

DOANE moved to set aside a continuance of a notice of trial for irregularity. The original notice of trial was continued by a notice on the 18th of *April* for the 21st. The 18th was on a *Friday*, and, as a *Sunday* intervened, he contended that there were not two clear days' notice, to which he was entitled. He cited *Grojean v. Manning* (a).

A continuance of notice of trial on *Friday* for *Monday* is sufficient.

ALDERSON, B.—Unless you are entitled to two clear days, the rule is to include the first day, and exclude the last; here, you must either include *Friday* or *Monday*, and the notice is therefore sufficient.

Rule refused.

(a) 2 Crompton & Jerv. 235; 2 Tyrwhitt, 728.

1834.

RICHARDS v. ISAAC.

Affidavits must
be intitled "*A.*
v. *B.*" and not
"*B.*, at suit of
A."

CHILTON, in moving for judgment as in case of a non-suit, produced an affidavit intitled "*Thomas David Isaac at suit of John Richards.*" That he contended was a sufficient designation of the cause, as such words were always employed in a plea; and therefore that the affidavit was properly intitled.

GURNEY, B., (sitting alone).—The usual and proper mode of intitling an affidavit is in the cause, "*A. v. B.*" The affidavit here deviates from that mode, and that has never been allowed.

Rule refused (*a*).

(*a*) See 1 C., M., & R. 709, S. C.

BOHRS v. SESSIONS.

It is too late
to apply for
security for costs
after judgment

BONSOR having obtained a rule *nisi*, for staying proceedings till the plaintiff should give security for costs, being resident in the *Isle of Man*—

cation is too late; but the rule may stand over till to-morrow, to produce an affidavit as to when and how the judgment was signed.

1834.
BOHRS
v.
SESSIONS.

The motion was again brought on before *Gurney, B.*, when it was stated that *Parke, B.*, on application at Chambers, set aside the judgment on the terms of taking short notice of trial.

Knowles contended, that, if the motion was made absolute, it could only be on payment of costs, as security for costs ought to have been previously demanded. *Baile v. De Bernales* (a), and *Jones v. Jones*.

GURNEY, B.—The rule must be absolute, on payment of costs, and the proper security given within two days.

Rule absolute accordingly.

(a) 1 B. & Ald. 331.

GREGORY v. TUFFS.

THIS was one of a great number of actions brought by the plaintiff against the defendant and other persons, for keeping houses of entertainment for public dancing, music, &c. without being licensed. The case was proved by some witnesses, who swore to a great number of instances; but, on cross-examination, admitted that they were hired at 5s.

In an action for penalties for keeping an unlicensed house for music and dancing, &c., and the evidence for the plaintiff was clear and positive, and might, if it was false, have been

answered by evidence on the other side, the jury requested to have the act of Parliament handed up to them, with which they retired to consider their verdict, and found in favour of the defendant: the Court, under these circumstances, granted a rule for a new trial, considering that the jury must have put a misconstruction upon the act, and that it was equivalent, therefore, to a misdirection, on which ground alone a new trial, in such an action, is usually granted.

1834.
GREGORY
v.
TUPPER

per might to visit such places with a view of giving evidence in these actions. The defendant's counsel addressed the jury, contending that no offence had been committed within the meaning of the act, and cited several authorities. He also put it to the jury, whether they could believe the witnesses; but no witnesses were called on the part of the defendant. After the case had been summed up by Lord *Lyndhurst*, C. B., who expressed his opinion that the case had been clearly made out, if the witnesses could be believed, and that the defendant, if he had thought proper, might have called witnesses to contradict them if their evidence was false, the jury were about to retire, when they requested that they might have the act of Parliament handed up to them, which the learned Judge allowed, no one objecting to it; but some of the counsel had left the Court. The jury retired, and found a verdict for the defendant.

Follett obtained a rule *nisi* for a new trial, upon the ground that the jury ought not to have had the act of Parliament handed up to them, but ought to have taken the law from the summing up of the learned Judge; that the verdict was so manifestly against the evidence, that it

Lord LYNDHURST, C. B.—These witnesses might have been contradicted.

1834.
 }
 GREGORY
 v.
 TUFFS.

ALDERSON, B.—The counsel for the defendant put it to the jury on the question of law as well as of fact: several cases were cited, and the other side was not heard.

Law and Platt.—It would be very inconvenient if a counsel was obliged to divide his address: first, as to the law, and, secondly, as to the fact. Suppose an indictment.

ALDERSON, B.—There the jury is judge both of law and fact.

Follett.—The argument on the other side amounts to this, that juries may refuse to put penal acts in force.

Lord LYNDHURST, C. B.—The only ground for a new trial is, that the jury may have formed their verdict on a misapprehension of law. The jury may have been virtually misdirected by allowing them to have the act. The proof was of such a nature, as to lead irresistibly to the conclusion that the jury must have formed their verdict on a misapprehension of law.

The Court took time to consider their judgment, which was afterwards delivered by —

Lord LYNDHURST, C. B.—This was a motion for a new trial in a penal action after a verdict for the defendant. It is not usual to grant a new trial in such an action, except for a misdirection. Now, if the jury have been misled by their own act, there is no reason why a new trial should not be granted, if we are satisfied that they were mistaken in point of law. We are satisfied in this case, the evidence being so extremely clear in favour of the plaintiff, that the

1834.

GREGORY
v.
TUFFS.

CASES ON POINTS OF PRACTICE, EXCH.

jury did not find their verdict on a misapprehension of facts, but of law. We have mentioned the case to the Judges of the other Courts, and they agree with us. The rule will, therefore, be absolute for a new trial.

Rule absolute.

FIDGETT v. PENNY.

In an action on an account stated, the defendant cannot now, under the plea of *non assumpsit*, give in evidence a subsequent account alleged to be in his favour.

THE declaration in this case contained a count for money had and received, and on an account stated. The defendant pleaded *non assumpsit*. The declaration bore date since the first day of last *Easter Term*, and, therefore, that case was subject to the rules of *Hilary Term*, *4 Will. 4(a)*, the claim sought to be recovered by the plaintiff amounting to a sum less than 20*l.* A Judge's order was obtained under the *3 & 4 Will. 4, c. 42, s. 17*, for trying the issue before the Secondary. At the trial, the plaintiff put in evidence an account dated the 5th of *February*, which stated between himself and the defendant; from which it appeared, that a balance of 9*l.* 1*s.* was in his favour. The particulars of the plaintiff's demand coincided with the account so given in evidence. On the part of the defendant, it was proposed to give a second account, dated 10th *March*, by which the plaintiff would appear to be indebted to the defendant. The defendant refused to ad-

to this leave, a rule *nisi* was obtained, and cause having been shewn against it—

1834.

FIDGETT
v.
PENNY.

Heaton was heard in its support.—He submitted, that, as the second account stated between the parties shewed that the plaintiff had no cause of action at the time of suing out the writ, the plaintiff could not recover on the first account. If the plaintiff were permitted so to proceed, no matter how long previously, an account had been stated between the parties, shewing the defendant to be indebted to the plaintiff, or how many accounts had since been settled, proving the liability to be the other way, the plaintiff would still be entitled to recover on the first account.

LORD LYNDEHURST, C. B.—From the particulars of demand furnished by the plaintiff, the defendant must have known that the action was brought upon the first account. From that, it appeared that the plaintiff was clearly entitled to recover the balance. The defendant has pleaded, however, only *non assumpsit*; and, since the new pleading rules, the defence of the second account cannot be given in evidence under that plea. The rule directs (a), that, in the action of *assumpsit*, “except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.” According to this rule, it is clear that the defendant could not, under his plea, have given the second account in evidence.

ALDERSON, B.—The second account is either a payment or a set-off, and the defendant by pleading the general issue has precluded himself from either of those defences ;

(a) *Ante*, p. 322.

1834.
FIDGETT
v.
PENNY.

for, by rule 3, under the same head (a), the pleas of payment and set-off must be specially pleaded.

GURNEY, B., concurred.

Rule discharged (b).

(a) *Ante*, p. 323.

(b) See also 1 C., M., & R. 108, S. C.

JACOBS v. PHILLIPS.

Interlocutory costs payable under an order of *Nisi Prius* by a defendant, previous to his bankruptcy, are proveable under the fiat, and therefore the certificate is a discharge from them, although an attachment has been obtained before the certificate is allowed.

Before the Court will discharge the bankrupt the

IN this case, when the cause was called on for trial, an affidavit being produced on the part of the defendant, stating the absence of a material witness, an order of *Nisi Prius* was accordingly made for putting off the trial on payment of the costs of the day by the defendant. These costs were accordingly taxed, and the *allocatur* was for 131*l.* 9*s.* The order of *Nisi Prius* was afterwards made a rule of Court. On the 24th of *January* following, a fiat issued against the defendant, and under it he was declared a bankrupt. On the 21st of *April* he was taken on an attachment for the above sum, and on the 22nd he obtained his certificate, which was afterwards confirmed on the 17th of *May* by the Court of Review. The defendant still re-

quired by the statute of the certificate being allowed had not been given, the Court could not take notice of it. The better course, therefore, was to let the rule be enlarged until the certificate was inrolled, unless the objection was waived.

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Hutchinson then agreed to proceed to the merits, on condition that, if the Court should be of opinion that the rule ought to be made absolute, it should not be drawn up until the certificate was inrolled. He contended, that the certificate only freed a bankrupt from debts due by him, or claims or demands rendered proveable by the provisions of the Bankrupt Act. The words of the Bankrupt Act differed from those of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 60, which discharged the insolvent from costs, and the effects of every decree or order for them. By s. 121 of the Bankrupt Act, the effect of the certificate is confined to debts and "all claims and demands hereby made proveable under the commission." The latter words of the section evidently only apply either to debts or claims and demands which might subsequently become debts, as in the case of annuities. In such a case as this, it is perfectly clear that an action of debt would not lie. He cited *Emerson v. Lashley* (a), *Fry v. Malcolm* (b), *Carpenter v. Thornton*, (c), *Ex parte Stevenson* (d). Then the order of *Nisi Prius* could not be considered as an agreement, for it was impossible to state any consideration. The case of *Riley v. Byrne* (e) was, therefore, distinguishable from the present. The cases of *Ex parte Eicke* (f), and *Ex parte Hill* (g), and others of that class, only shew that, where costs are incurred in prosecuting a claim of debt, they are incorporated with it, and the Courts will not separate

(a) 2 H. Bl. 251.

(b) 4 Taunt. 705.

(c) 3 B. & Ald 52.

(d) 1 Mont. & M'Arthur, 262.

(e) 2 B. & Adol. 779.

(f) 1 Glynn & J. 261.

(g) 11 Ves. 646.

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them from it; and, therefore, the certificate is a bar to them.

Follett in support of the rule.—The other side contends, that, in order to render the certificate a discharge of the defendant's liability, the demand must constitute a debt. All that is necessary, however, is that the demand should be ascertained. It is of no importance whether the demand is the subject of an action, a suit in equity, or an attachment, whether at law or in equity. A petitioning creditor's debt, it is true, must be a legal one; but it does not at all follow, because that is the case, that only legal debts are proveable under the commission. The distinction between the debt which will support a commission and that which is proveable under it, is clearly ascertained and acted on. He cited *Ex parte Charles* (a), *Eden's Bankrupt Law* (b), *Gregory v. Hurrill* (c), *Ex parte Hill* (d), *Carpenter v. Thornton* (e). Whatever the claim may be, if it be of a pecuniary nature, if its amount be ascertained before the bankruptcy, in whatever manner it can be enforced, it is barred by the commission. Where a contempt of Court, strictly so called, has been committed, as in the case of disobedience to a *subpœna*, there is a difference.

the bankrupt was entitled to his discharge. On these authorities, therefore, the defendant is entitled to be discharged.

Cur. adv. vult.

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LORD LYNTHURST, C. B.—Taking all the circumstances into consideration, we think there was no agreement to pay these costs. Our decision, however, does not depend on that question. We think there was an ascertained claim previous to the bankruptcy, which might, therefore, have been proved under the fiat; and therefore the defendant is entitled to his discharge.

Rule absolute, but not to be drawn up until the certificate shall be inrolled (a).

(a) 1 C., M., & R. 195, S. C.

SPICER v. BURGESS.

ADOLPHUS and *Thesiger* shewed cause against a rule *nisi* for a new trial. It was an action of trespass; and on the part of the defendant it became necessary to release two persons named *Churchill* and *Pixey*, in order to render them competent as witnesses. On production of the release, it appeared that it had originally been prepared for *Churchill* only. As the cause proceeded, however, it was thought expedient to release *Pixey* also. His name was therefore inserted, and conformable alterations made in the instrument. Previous to the alterations the defendant had executed the release, but it was not delivered to *Churchill*. The latter was not aware of its existence, for the defendant's attorney had not permitted it to go out of his possession. When the alteration had been made the defendant again executed the release. It was then objected, on the part of the plaintiff, that, at the time

Where a release of a witness has been executed, and before it is delivered to him, the name of another witness is introduced, and the instrument re-executed, it is not necessary to have a fresh stamp.

Quere, whether one stamp is sufficient on a release of two witnesses?

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of the first execution, it was a perfect deed, and the stamp consequently occupied. When it was re-executed, and the name of *Pizney* introduced, a new stamp became requisite. No such stamp having been used, the witnesses were not competent. The objection was overruled, and the defendant had a verdict. A rule *nisi* was afterwards obtained for a new trial, and against that rule cause was now shewn. It was contended that the release being *in fieri* at the time the alteration was made, the stamp had not been occupied so as to render it necessary to have a fresh stamp. They cited *Webber v. Maddocks* (a), *Matson v. Booth* (b), *Jones v. Jones* (c), *Doe d. Garmons v. Knight* (d), *Johnson v. Baker* (e), *Shepherd's Touchstone* (f), *Comyns's Digest* (g), *Johnson v. Baker* (h).

Platt, in support of the rule, contended that the release to *Churchill* had become a perfect deed by the execution of it for all purposes. The stamp had thus been once occupied, and therefore could not again be used. He distinguished the present from the cases cited on the other side.

Cur. adv. vult.

Lord LYNCHBURGH. C. R. — Had the release in the first

and there, the Court said that all was *in fieri*, and merely in the nature of an escrow. The cases of *Murray v. Earl of Stair* (a), and *Jones v. Jones*, are decisive as to the objection taken. Though the release in point of form was completely executed, it was placed in the hands of the attorney to be used only in case of necessity. We are of opinion, therefore, that it was *in fieri* only, and, therefore, that the re-execution did not render a new stamp necessary. It is a matter of question, whether two persons could be released on one stamp; but that objection was not made at the trial. We are all of opinion that the rule must be discharged.

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Rule discharged (b).

(a) 2 B. & C. 88; 3 D. & R. 278, S. C.

(b) See also 1 C., M., & R. 129, S. C.

HAMMOND v. THORPE.

ERLE and *Channell* shewed cause against a rule *nisi*, requiring the plaintiff's attorney to pay the costs of defending this action. The facts on which the rule had been obtained appeared to be these: the plaintiff was an illiterate person, and the attorney, against whom the application was made, induced him to sign a paper, with the contents of which he was unacquainted, but which authorized the action to be brought. It was an action of trespass for breaking the plaintiff's close, and the defendant pleaded leave and licence. When the cause came on to be tried, and some of the facts were disclosed, the learned Judge at *Nisi Prius* suggested that it would be better a juror should be withdrawn. The parties yielded to this suggestion, and a juror was withdrawn accordingly. The present application therefore was, that, as the action had been brought without the consent of the plaintiff, the attorney who had brought it might be compelled to pay the costs of

A defendant, by consenting to withdraw a juror, waives any supposed right he may have to claim his costs from the attorney for the plaintiff, on the ground of the action being brought without consent of the latter.

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v.
THORPE.

the defendant incurred by him in his defence. The affidavits in answer to the rule completely denied the facts stated on behalf of the defendant.

Thesiger supported the rule.

ALDERSON, B. (a).—The question here is, whether the defendant, having consented to the withdrawal of the juror and the payment of his own costs, can now claim from the plaintiff's attorney those costs which he so consented to pay. There is no precedent for this application. Had the trial proceeded, and the defendant had a verdict in his favour, and the plaintiff was unable to pay his costs, the Court might perhaps then have placed the attorney in the situation of the plaintiff, and required him to pay the defendant's costs of defending the action. But having here consented to pay his own costs, he cannot afterwards cast the burden upon another person. Besides, the affidavits on the part of the attorney completely answer those on which the application was founded.

The rest of the Court concurred.

COURT OF COMMON PLEAS,

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

MILLARD, Gent., one &c., v. MILLMAN.

1834.

IN this case, the defendant was in the custody of the Marshal, on process issuing out of the Court of *King's Bench*. The plaintiff sued out a writ of *detainer*, which was regularly served pursuant to the provisions of 2 *Will.* 4, c. 39, s. 8 (a). It appeared to the officer of the Court, that the plaintiff could not declare against the defendant in this Court while he was in the custody of the Marshal. A *habeas corpus* was, therefore, obtained to remove him into the *Fleet* Prison for the purpose of declaring against him.

A prisoner in the custody of the Marshal, if detained on process from the *Common Pleas*, need not now be removed into the custody of the Warden, in order to be charged with a declaration.

Goulburn, Serjt., applied, on behalf of the defendant, for the enlargement of the time within which the writ was made returnable, on the ground of his extreme age and bad state of health.

Per Curiam.—Before the passing of the Uniformity of Process Act, if a defendant was in the custody of the Marshal, it was necessary to remove him by *habeas corpus* into the custody of the Warden of the *Fleet* Prison,

(a) 3 Dowl. Stat. 150.

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previous to the plaintiff declaring against him. But since the passing of that statute that necessity and consequent inconvenience have been removed (a).

Rule refused (b).

(a) The words of the section are, "that, when it shall be intended to detain in any such action any person being in the custody of the Marshal of the *Marshalsea* of the Court of *King's Bench*, or of the Warden of the *Fleet* Prison, the process of detainer shall be according to the form of the writ of detainer contained in the schedule of the act, and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of

the said Courts, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be; and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rules to be made by the Judges of the said Courts."

(b) See *Barnett v. Harris*, clerk, ante, p. 186, where it was held, that if a defendant is detained in the custody of the Warden, on process issuing out of the *King's Bench*, the declaration should state him to be in the custody of the Warden; and it is not necessary to bring him up by *habeas corpus* to charge him with a declaration. The above case is also reported in 3 M. & Scott, 63.

he contended, was however too late. The service of the *distringas* had been effected on the 30th of *March*, but the application to set it aside was not made till the 17th of *April*. According to the directions of 1 *Reg. Gen. H. T. 2 Will. 4, s. 33 (a)*, the time here allowed to pass, namely, eighteen days, must clearly be considered as an unreasonable delay.

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 WARREN.

Talfourd, Serjt., *contrà*, submitted, that, as the omission of the attorney's name was in direct contravention of the act of Parliament, the *distringas* must be considered as a mere nullity.

TINDAL, C. J.—It is ordered, by 10 *Reg. Gen. M. T. 3 Will. 4 (b)*, “that if the plaintiff or his attorney shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any Judge.” In this case, therefore, the writ is not void, but is merely irregular. The question then is, whether this application was made within a reasonable time? I am of opinion that it was not. The present rule must, therefore, be discharged with costs.

GASELEE, J., was of opinion that 10 *Reg. Gen. M. T. 3 Will. 4*, was not imperative, but merely directory.

PARK, J., and ALDERSON, J., concurred.

Rule discharged, with costs (*c*).

(a) *Ante*, Vol. 1, p. 187.

(b) *Ante*, Vol. 1, p. 473.

(c) 3 M. & Scott, 163, S. C.

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If a cause is referred to a barrister, and he improperly admits evidence, the Court will not disturb his award.

Wilde, Serjt., moved to set the award aside, on the ground that the testimony of *Tucker* had been improperly received.

TINDAL, C. J.—I have always understood it to be settled that where parties choose a lawyer for their arbitration, they bind themselves to him for the Court and jury.

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ASHTON v. NAULL.

THIS was an application under the 43 *Geo.* 3, c. 46, s. 3, to give the defendant his costs, on the ground of his having been arrested without reasonable and probable cause. It appeared, that mutual dealings had taken place for some time between the plaintiff and defendant. In the course of these, the latter became indebted to the former in a sum of 105*l.* 17*s.* 6*d.* How much was due to the defendant was unascertained; but the plaintiff was aware of a sum of 39*l.* 9*s.* 11*d.* being due for certain bricks and tiles supplied. The plaintiff, however, arrested the defendant for the full amount of his claim. At *Nisi Prius* the cause was referred, and the plaintiff ultimately recovered under an arbitrator's certificate the sum of 17*l.* 1*s.* 11½*d.* only. A rule *nisi* having been obtained to give the defendant his costs—

If the plaintiff arrests a defendant for one side of a mutual account, without giving credit for what he knows to be due from himself, although the defendant has refused to deliver his account, the latter is entitled to his costs under the 43 *Geo.* 3, c. 46, s. 3.

Coleridge, Serjt., shewed cause.—His affidavit stated, that the defendant had refused to deliver him his account when required so to do. He cited *Germain v. Burrows* (a), *Doulan v. Brett* (b), *Day v. Picton* (c), *Silversides v. Bowley* (d), *Turner v. Prince* (e), *Payne v. Acton* (f), *Keene v. Deeble* (g).

Wilde, Serjt., was proceeding to support the rule, when he was stopped by the Court.

TINDAL, C. J.—The plaintiff must have known that he was indebted to the defendant in the sum of 39*l.* 9*s.* 11*d.* Under these circumstances, an arrest for the whole amount

(a) 5 Taunt. 259.

(b) 5 Man. & Ryl. 29; 10 B. & C. 117.

(c) 5 Man. & Ryl. 51; 10 B. & C. 120.

(d) 1 J. B. Moore, 92.

(e) 2 M & P. 305; 5 Bing. 191,

S. C.

(f) 1 B. & B. 278; 3 J. B.

Moore, 605, S. C.

(g) 3 B. & C. 491; 5 D. & R.

383, S. C.

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of the claim which the plaintiff had upon the defendant must be considered as without reasonable and probable cause. The Court, in the case of *Dronefield v. Archer* (a), held, that where there are items clearly due on both sides, and the plaintiff holds the defendant to bail for the whole sum due to him, that is an arrest without probable cause. That case, therefore, determines the present. The rule must be made absolute.

PARK, J., GASELEE, J., and ALDERSON, J., concurred.

Rule absolute (b).

(a) 1 D. & R. 67; 5 B. & Ald. 513. (b) See 3 M. & Scott, 184, S. C.

COTTER v. The Bank of ENGLAND.

A party may avail himself of the Interpleader Act, although he claims a lien on the goods against all parties.

He is entitled to the costs of his

THIS was an application under the Interpleader Act (1 & 2 Will. 4, c. 58, s. 1) (a), requiring the plaintiff and certain claimants on the matter in dispute to appear before the Court and state their claims. The above action was brought to recover the value of certain bullion deposited with the Bank of *England*. After the action was com-

entitled to the relief given by the statute. He cited *Braddick v. Smith* (a), where the Court had decided, that, if the intermediate party claimed a lien on the property, the Court could not interfere.

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The Bank of
ENGLAND.

Bompas, Serjt., appeared for *Harris* and *Guest*.

Wilde, Serjt., in support of the rule, distinguished the present from the case of *Braddick v. Smith*, as there the claim of lien was only as against one of the claimants. With respect to the costs, he cited the cases of *Aldridge v. Mesner* (b), and *Farebrother v. Pratter* (c), for the purpose of shewing, that, where parties came fairly to interplead, a Court of equity will grant them their costs.

TINDAL, C. J.—By sect. 1, of the Interpleader Act, the applicants must shew that they do not “claim any interest in the subject-matter of the suit.” The Bank, in the present instance, do not claim any interest in the bullion itself, which is the subject-matter of the suit, but they merely claim a lien for the freight and other charges in respect of it. They seek not to charge either party in particular, as whoever obtains the bullion must pay the charges for which they claim a lien. The case, therefore, is distinguishable from that of *Braddick v. Smith*. As the Bank appear to have acted fairly in coming to interplead, I think they ought to have their costs paid out of the proceeds of the bullion, or else in the first instance.

PARK, J., GASELEE, J., and ALDERSON, J., concurred.

Rule absolute: the form to be settled before a Judge at chambers (c).

(a) 2 M. & Scott, 131; 9 Bing. 84, S. C.

(b) 6 Ves. 418.

(c) 1 Daniell, 64.

(d) See *Ducar v. Makintosh*, post, p. 730. The above case is also reported in 3 M. & Scott, 180.

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If a party applying under the Interpleader Act acts fairly, he will be allowed his costs out of the proceeds of the thing in dispute, and the party ultimately unsuccessful must repay them.

DUEAR *v.* MACKINTOSH.

IN the present case, an application was made under the 1 & 2 Will. 4, c. 58, s. 1, (the Interpleader Act), in order that the plaintiff and the claimant might state their respective claims, and that the defendant might be relieved from them. The case having been disposed of, an application was made on the part of the defendant for his costs in applying to the Court.

TINDAL, C. J., was of opinion, that, as in the Courts of equity if a party appeared to have acted fairly with respect to the fund in dispute, he was allowed his expenses out of it; in the present case, he ought to have them in the first instance out of the fund, and the party ultimately unsuccessful be compelled to pay them.

The rest of the Court concurred, and the rule drawn up accordingly (a).

(a) See also *Cotter v. The Bank of England*, ante, p. 728. This case is also reported in 3 M. & Scott, 174.

precarious state, and that for some time past he had been seriously ill. It was also sworn, that, in the deponent's opinion, danger to the life of the witness might be caused by his attendance in a hot and crowded Court. These facts, he contended, were not sufficient to authorize the Court in dispensing with the personal attendance of the witness at the trial.

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Per Curiam.—The opposite party will suffer no inconvenience in consequence of this examination being taken, because, by sect. 10 of the statute, it cannot be read at the time of the trial without consent, unless it is made satisfactorily to appear that the witness is beyond the jurisdiction of the Court, dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial. As the medical attendant has sworn that the witness is in a precarious state of health, and that his attendance at the trial may produce danger to his life, we think the examination may be allowed on payment of costs.

Rule absolute, on payment of costs (a).

(a) See *Abraham v. Norton*, ante, Vol. 1, p. 266. This case is also reported in 3 M. & Scott, 161.

CLOTHIER v. Ess.

ANDREWS, Serjt., shewed cause against a rule nisi for discharging the defendant out of custody, on the ground of irregularity. The objection was, that the defendant had been taken in execution in consequence of a judgment signed on a *cognovit*, without one day's notice of taxation, pursuant to 12 Reg. Gen. T. T. 1 Will. 4 (a).

An objection, that the defendant's Christian name is omitted in the title of an affidavit supporting a rule, is not waived by appearing and producing affidavits in answer.

(a) *Ante*, Vol. 1, p. 105.

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As a preliminary objection, he contended, that, as the Christian name of the defendant was omitted in the title of the cause, the Court could not entertain the motion.

Bompas, Serjt., submitted, that the plaintiff had waived the objection by appearing, and producing affidavits in answer.

The Court thought the objection was not waived, as the plaintiff might have produced the affidavits to avoid having to pay his own costs, if the rule were discharged on the preliminary objection. The omission of the defendant's Christian name was fatal, as it prevented its being a complete name, and perjury could not be assigned on such an affidavit.

Rule discharged, with costs (a).

(a) S. C. 3 M. & Scott, 216.

COOK v. CLARK, COLE, RICHARDS and Wife.

An officer of the
 Southwark

TRESPASS for breaking and entering the plaintiff's dwelling-house. Pleas, first, the general issue; and

was afterwards obtained, pursuant to leave reserved, on the ground that the defendants should have had fourteen days' notice of action, according to section 21 of the 46 Geo. 3, c. lxxxvii. The words of the section are, "that no action or suit shall be commenced against any person or persons, for any thing done in pursuance of the two recited acts of the 22nd and 32nd years of his said late Majesty George the Second, and of this act, or of any or either of them, or on account of any order, determination, judgment, or decree of the commissioners, until fourteen days' notice thereof shall have been given in writing."

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CLARK.

Spankie, Serjt., shewed cause against this rule; and contended, that the officer, in the present case, had exceeded his authority, and therefore no notice of action need be given to him. Although, from the case of *Beechey v. Sides* (a), it must be concluded, that, if a party *bond fide* believed or supposed that he was acting in pursuance of an act of Parliament, he was entitled to the notice of action required by that statute; yet, in the present case, the defendants having made no previous inquiry to justify their entering the plaintiff's house in search of *Simmonds*, they could not believe or suppose themselves to be acting in pursuance of the statute, under the authority of which the warrant was granted. He cited also *Edge v. Parker* (b). In order to justify the defendants in entering the plaintiff's house, they must have either an express or an implied authority. They had no express authority from the warrant; and they had no implied authority, because they could not *bond fide* think that they were acting in pursuance of it.

Andrews, Serjt., was about to support the rule when he was stopped by the Court.

(a) 9 B. & C. 806.

(b) 8 B. & C. 697.

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v.
CLARK.

CASES ON POINTS OF PRACTICE, C. P.

TINDAL, C. J.—The question which the Court is now called upon to decide is, whether the defendants *bonâ fide* committed this trespass in pursuance of the act under the authority of which this warrant was issued? No doubt can exist, that, as the warrant authorized the officer to search for *Frances Simmonds* wherever she might be found, he thought he had a right to enter any place within the jurisdiction of the Court. The case, therefore, falls within the general principle, that acts for protecting officers in the execution of their duty should receive a liberal construction. This case is distinguishable from *Edge v. Parker*, for there the party entering the house of a third person had no authority for that purpose; as, although the 6 *Geo. 4*, c. 16, s. 27, empowered him to enter a house where the bankrupt's goods might be, yet by sect. 29 he was bound to obtain a search warrant before entering the house of a third person in search of such bankrupt's goods. The defendant there, however, had not obtained a search warrant, and, therefore, he could not have honestly thought that he was acting in the discharge of his duty without such authority. Although the jury have found that the defendants had not reasonable ground for supposing *Frances Simmonds* was in the plaintiff's house, yet the objection founded on the want of notice had been previously made, and the case only went to the jury to the amount of damages, subject to the opinion of the Court. The defendants were not entitled

come within the principle stated by Lord *Tenterden* in *Beechey v. Sides*, where he says, "it has uniformly been held, that, where a party *bond fide* believes or supposes that he is acting in pursuance of an act of Parliament, he is within the protection of such a clause." There can be no doubt, that, in this case, the defendants thought they were justified in entering in pursuit of *Frances Simmonds*, whose name was mentioned in the warrant. There is no distinction between process sued out of a court established by a local act and proceedings at common law.

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CLARK.

BOSANQUET, J.—In order to entitle the defendants to the notice prescribed by sect. 21, it is not necessary that they should be able to justify entering the plaintiff's house, provided they have acted *bond fide* and under colour of the statute, "or on account of any order, determination, judgment, or decree of the commissioners appointed" under the act. If the defendants had reasonable ground for supposing that they were acting in pursuance of the statute, they were entitled to the notice provided by sect. 21.

Rule absolute (a).

(a) S. C. 3 M. & Scott, 371.

EMERY and MIDDLETON v. MUCKLOW and HANCOX.

WILDE, Serjt., shewed cause against a rule for striking the name of the plaintiff *Middleton* out of the declaration, unless the plaintiff *Emery* should give him an indemnity against costs. It appeared, that the two plaintiffs were creditors with a number of others of a person named *James Mucklow*. The latter having become insolvent, a deed of assignment of his estate and effects for the bene-

If a creditor becomes trustee under a composition deed, but does not execute it, and an action is brought in his name and that of another trustee without his consent, unless there is a suggestion of fraud,


the Court will not strike his name out of the declaration.

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fit of his creditors was executed to the plaintiffs as trustees. To this *Middleton* consented, but never executed the deed. Afterwards, wishing to withdraw from the trusteeship, he gave notice to his co-trustee, *Emery*, of his wish, and also to the other creditors of the insolvent estate. Certain goods of the insolvent were afterwards distrained by his father, *Thomas Mucklow*, for rent. *Emery* replevied, and the proceedings were regularly removed. A demand of declaration was afterwards made on *Middleton's* attorney, and notwithstanding notice from him that the latter would not be a party to the suit, *Emery* declared in the joint names of himself and *Middleton*. The present application, therefore, was that *Middleton's* name might be struck out of the declaration, unless *Emery* gave him an indemnity for costs. The learned Serjeant contended, that the Court ought not to interfere, as the rights of both plaintiffs were equal under the deed of assignment, and one could not decline to act with respect to *Mucklow's* estate and effects, which under the trust deed had been duly assigned to them both.

Adams, Serjt., supported the rule.

TINDAL, C. J.—It has not been shewn by *Middleton*



1833.

HAYWARD v. PRIEST.

IN this case the defendant, who was a prisoner in the custody of the Warden of the *Fleet*, was brought before the Court under the compulsory clauses of the Lords' Act. On examining the notice, it was dated on the 6th instant, and did not therefore expire till the 26th; and the rule for bringing up the defendant was dated the 24th. He appeared on the 28th, at the sitting of the Court.

Under the compulsory clauses of the Lords' Act, the twenty days' notice must expire before the first day of the term in which the defendant is to appear, or at any rate before taking out the rule for his appearance.

The Court was of opinion, that, under the compulsory clauses of the Lords' Act, the defendant being entitled to twenty days' notice of being brought up before the Court, they ought to expire previous to the term in which he was brought up, or at any rate before the plaintiff took out his rule for bringing the defendant up. Were the application to bring him up at the assizes, the twenty days' notice might expire within the antecedent term. Although the opinion of Mr. Justice *Parke* differs from this view, that was only the decision of a single Judge (a).

Prisoner remanded (b).

(a) *Jones's case*, Chapman's Practice, 316. There, the notice was served on the 18th of October, and the insolvent brought up on the 11th of November. It was objected, that the notice should have been served twenty days before the

first day of the term. *Parke*, J., on the authority of a decision of *Buller*, J., was of opinion, that the notice had been served in time.

(b) S. C. 3 M. & Scott, 388.

1833.

PATERSON v. POWELL.

Where a defence is carried on in the name of a person not an attorney of the Court in which the action is brought, the plaintiff may discontinue, on payment of the sums advanced by the defendant to his attorney, and without costs, if none have been advanced.

WILDE, Serjt., obtained a rule to shew cause why the plaintiff should not be allowed to discontinue the action without costs, under these circumstances:—It was an action on a policy of insurance, and the plaintiff had a verdict. A rule was afterwards made absolute for a nonsuit, or a new trial. The defendant subsequently gave notice of trial by proviso; which notice was afterwards set aside, on the ground that the attorney, in whose name the notice was given, had ceased to be an attorney of this court. The object of the present application was, that the plaintiff might be at liberty to discontinue without payment of costs, as it was sworn that the attorney in whose name the defence had been conducted had ceased, since the year 1830, to take out his certificate as a *London* attorney. The proceedings having been conducted by an unauthorized person, the defendant would not be liable to pay costs to him. It would be unjust, therefore, to compel the plaintiff to pay costs to the defendant. He cited the cases of *Hopwood v. Adams* (a), *Hawkins v. Edwards* (b), *Pribble v. Baghurst* (c), and *Vincent v. Holt* (d).

taken out his country certificate. The application now made was clearly too late, as it was decided in *Price v. Parker* (a) that a plaintiff cannot discontinue after verdict. But, at any rate, the plaintiff was bound to pay to the defendant all the advances made by the latter to his attorney for the purpose of conducting his defence, as his right could not be affected by the irregularity of his attorney in such a matter. They cited *Reader v. Bloom* (b), *Welch v. Pribble* (c), *Young v. Dowlman* (d), *Anonymous* (e).

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PATTERSON
&
POWELL.

The Court was of opinion, that the defendant was entitled to receive the 70% advanced by him to his attorney.

IN another action brought by the same plaintiff in the name of the same attorney, where no advances had been made, the plaintiff was allowed to discontinue without payment of costs. By the rule ultimately drawn up, the plaintiff undertook to bring no further action.

Rule absolute accordingly (f).

(a) 1 Salk. 178. See *Roe* d.
Gray v. Gray, 2 W. Bl. 815.

(b) 10 J. B. Moore, 261; 3
Bing. 9, S. C.

(c) 1 D. & R. 215.

(d) 3 Y. & J. 24.

(e) 2 Chit. Rep. 98.

(f) S. C. 3 M. & Scott, 195.

BYFIELD v. STREET.

IN this case the defendant was arrested on a *capias*, the date of which was "9th day of May, in the third year of the reign of King William the Fourth." The copy delivered to the defendant, however, left a blank for the day of the month, and was dated in the ninth year of William the Fourth. A rule was obtained to discharge the defendant out of custody, on the ground of the above variance;

If the copy of a *capias* delivered to the defendant differs in its date from the original, the Court will not allow it to be amended.

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and another to amend the copy according to the writ. Both rules came on together.

Wilde, Serjt., appeared in support of the amendment. He contended, that the defendant could not be misled by the variance from the original writ. The case, therefore, came within the principle adopted by the Court in all cases, that, where there was something to amend, they would allow an amendment. This applied to mesne and final proce . He cited *Bourchier v. Wittle* (a), *Davis v. Owen* (b), *Carty v. Ashley* (c), *Hunt v. Kendrick* (d), *Atkinson v. Newton* (e), *Newnham v. Law* (f), *Mackie v. Smith* (g), *Stevenson v. Dawes* (h), *Walker v. Hawkey* (i), *Stevenson v. Castle* (j). Although the 2 & 3 Will. 4, c. 39, s. 4 (k), requires that a copy should be delivered to the defendant, the Court could still amend the copy by the writ, as the original was correct; and no injury could result to the defendant, as he had had an opportunity of seeing that original.

Andrews, Serjt., *contra*, was stopped by the Court.

TINDAL, C. J.—The principle of the cases cited does

must be delivered to the defendant arrested. Here, a copy has not been delivered, and, therefore, the condition on which the arrest becomes complete is broken. The object of the statute being to give the defendant full and accurate information of the nature of plaintiff's demand, it is most important that the copy should perfectly correspond with the original writ.

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 BYFIELD
 v.
 STREET.

PARK, J., and BOSANQUET, J., concurred.

Rule for discharging the defendant out of custody on entering a common appearance absolute. Rule for amendment discharged (a).

(a) S. C. 3 M. & Scott, 466. *ante*, p. 536; and *Richards v. Stur-See Hildyard v. Baker, ante*, p. *art, post*.
 17; *Hodgkinson v. Hodgkinson*,

HODGES v. Lord LITCHFIELD.

WILDE, Serjt., shewed cause against a rule *nisi* for allowing the defendant to withdraw his plea, and pay into Court the sum of 185*l.* on the first count of the declaration, except as to so much of the damage therein alleged as related to the charges and expenses of the suit therein mentioned, commenced in the Court of *Chancery*, and as to the losses alleged to have been suffered and sustained by the plaintiff on the resale of sheep, bricks, and hurdles therein mentioned. It was an action of *assumpsit* to recover from the defendant damages for the breach of a special contract for the sale of an estate. The defendant pleaded the general issue. The object of the present application was to pay in a certain sum of money on a part of the first count. The present case, however, was not one in which the Court would allow money to be paid in at all.

Where a whole count applies to a demand for unliquidated damages, money cannot be paid into Court on a part of it.

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 Hodges
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 Litchfield.

Still less would they permit it to be paid in on a part of a count. The action was here for damages; but money could only be paid into Court where the action was to recover a debt, the amount of which was certain, or capable of being ascertained by computation only, without the jury exercising any kind of discretion. He cited *Hallett v. The East India Company* (a), *Salt v. Salt* (b), *Squire v. Archer* (c), *Hail v. Pickford* (d), and *Strong v. Simpson* (e).

Talfourd, Serjt., supported the rule; and contended, that as the plaintiff, by his particular of demand, had ascertained the amount of his claim, the present case came within the principle of those cited on the other side. Where the plaintiff made a demand substantially for a specific sum of money, the defendant might pay money into Court. The demand in this case was substantially for a specific sum of money, and, therefore, the defendant must be at liberty to make a payment into Court. He cited *Hutton v. Bolton* (f), and *Walker v. Moore* (g).

Per Curiam.—We cannot allow the defendant to pay money into Court on part of a count, which wholly applies to a demand for unliquidated damages. But if a breach

1833.

PLEVIN and Others v. HENSHALL and Others.

JONES, Serjt., shewed cause against a rule *nisi* for reducing the amount of the plaintiffs' verdict to the extent of a certain sum paid by the defendants for rent due from the plaintiffs. It was an action of trover for certain goods of which the defendants had taken possession under certain deeds of conveyance and assignment, bearing date the 11th *January*, 1833. The plaintiffs claimed under a deed of assignment dated in *December*, 1832. The jury found for the plaintiffs, damages 94*l.* 13*s.* 6*d.* When the defendants took possession of the goods, they of course took possession of the premises on which they were. These premises were liable to the payment of certain rent, which had become due from the person who had executed both assignments previous to the possession being so taken. The amount of it was 118*l.*, and the landlord having distrained, the defendants paid it. The defendants were now desirous that the plaintiffs' execution in the action of trover should be limited to its excess beyond the amount of the rent paid. This the learned Serjeant contended could not be permitted. It was in reality an application to allow a set-off, whereas a set-off could not be allowed in an action of trover.

If a defendant, liable in trover for taking goods, pays rent due from the plaintiff on the premises whence they are taken, the execution may be limited to the excess of the verdict in trover beyond the rent paid.

Wilde, Serjt., *contra*, was stopped by the Court.

TINDAL, C. J.—The present case clearly comes within the principle constantly acted on in practice, that in an action of *tort* if the defendant has satisfied a part of the claim, the verdict may be reduced to that extent, if the payment is made previous to suing out execution. As the rent was due from the person under whom both parties claimed, under any state of circumstances it must have been paid to the landlord; if the plaintiffs had had possession of the

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PLEVIN
v.
HENSHALL.

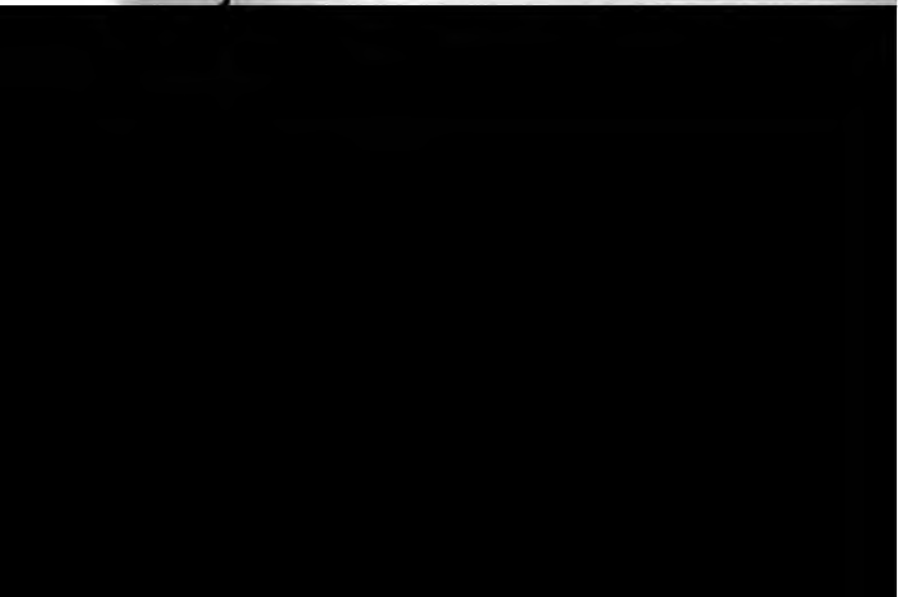
goods at the time when the landlord distrained, they must have paid the rent. The effect, therefore, of granting this application is only to put the plaintiffs in the same position as if they had paid the rent themselves. The application is similar to an *audita querela* (a). The use of that writ has however now become unfrequent, and recourse is had in such cases to the equitable jurisdiction of the Court. I think the present rule ought, therefore, to be made absolute.

The remainder of the Court concurred.

Rule absolute for restraining the plaintiffs' execution to 829*l.* 13*s.* 6*d.* on payment by the defendant of the costs of this application (b).

(a) See *Oguel v. Randal*, Cro. 49; 2 Wms. Saund. 148 a. n. Jan. 29; *Alford v. Tatnel*, 2 Mod. (b) S. C. 3 M. & Scott, 403.

POUND v. LEWIS.



replication was necessary. By the language of the rule, which is "service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication or such other subsequent pleading;" it is clear that a rule to reply must be served, for the service of such rule is directed to constitute a sufficient demand of a replication. Although an alteration in the practice has not yet been effected in the office, it is certainly irregular not to serve the rule. The rule in this case must, therefore, be made absolute, but without costs.

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v.
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Rule absolute, without costs (a).

(b) S. C. 3 M. & Scott, 210.

SIGGERS v. SANSON.

WILDE, Serjt., shewed cause against a rule for setting aside the writ of summons in this case, and all subsequent proceedings, on the ground of irregularity. The summons was originally issued into *Middlesex*; but it being afterwards ascertained that the defendant resided in *Surrey*, the name of the latter county was inserted in lieu of the former, but without resealing the writ. After service, the defendant took out a summons to stay proceedings on payment of debt and costs; after hearing which, a Judge's order was made for that purpose, which was afterwards made a rule of Court. By taking out this summons, the defendant waived the irregularity, and therefore it was now too late to take the objection.

The name of one county being substituted for another in a writ of summons without resealing, the proceedings were set aside without costs, although the defendant had obtained an order to stay proceedings on payment of debt and costs.

Bompas, Serjt., contended, that the defendant could not waive the objection on which this rule was obtained, because the introduction of the name of a new county,

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 SIGGERS
 v.
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without resealing, rendered the writ a nullity, and did not amount to a mere irregularity. He cited *Anonymous* (a), and *Taylor v. Phillips* (b).

Per Curiam.—The attorney in this case has been guilty of gross misconduct, and on that ground we think the proceedings ought to be set aside on payment of the debt without costs. The plaintiff will suffer no disadvantage by this mode, as in such a case he will not be bound to pay these costs to his attorney.

Rule absolute (c).

(a) 2 Chit. Rep. 237. (b) 3 East, 155. (c) S. C. 3 M. & Scott, 194.

TAYLOR v. LEIGHTON.

Where an attesting witness, to an old warrant of attorney, is abroad, his affidavit need not be pro-

WILDE, Serjt., moved to enter up judgment on an old warrant of attorney. The peculiarity in the case was, that the attesting witness was abroad. He had, however, the affidavit of the plaintiff, who stated himself to have

1833.

GOBBEY v. DEWES.

WILDE, Serjt., moved for an attachment absolute in the first instance, against certain persons, whose names were disclosed in the affidavit on which he moved, for rescuing the defendant out of the custody of the Sheriff of *Middlesex*. The only peculiarity in the case was, that the Sheriff's return to the writ was, that the defendant had been rescued out of the custody of his bailiff, and not out of his own custody. It appeared, however, on examining the cases, that such a return was sufficient. He cited *Woodgate v. Knatchbull* (a), *The King v. The Sheriff of Middlesex* (b), *Comyns's Digest* (c), *Tidd's Forms* (d).

Where a defendant has been rescued from a bailiff, the Sheriff may return the rescue as from his bailiff, and not from himself.

Per Curiam.—We think the return sufficient.

Rule absolute in the first instance for an attachment (e).

(a) 3 T. R. 148.

(d) Appendix, 109, 9th ed.

(b) 1 B. & Ald. 190.

(e) S. C. 3 M. & Scott, 556.

(c) Tit. *Rescue*, (D. 4) & (D. 5.)

BURT v. JACKSON.

BOMPAS, Serjt., shewed cause against a rule *nisi* for setting aside a writ of summons upon the ground that it was not signed by the filacer. He contended, that, before the Uniformity of Process Act, the filacer need not put his name to a common writ of *capias* issued out of this Court (a). That act did not make any change in the practice. It was true, that, by 2 *Reg. Gen. M. T.* 3

The filacer need not sign a writ of summons, if the seal of the Court is impressed upon it.

(a) *Frost v. Eyles*, 1 H. Bl. 120.

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Will. 4 (a), fees were allowed to be taken both for signing and sealing writs issued under that act; but no direction was given that the writs should be signed. In the present case, the seal of the Court was impressed upon the writ, and that was all that could be required.

Jones, Serjt., in support of the rule, contended, that the mere sealing or stamping the writ did not sufficiently inform the defendant what filacer had issued it, as there were several filacers in the Court, and the seal was used indiscriminately by them all. By sealing, therefore, the defendant could not ascertain whether the proper officer had issued it. The necessity of signing it was recognised by the rule of Court, which directed a certain fee to be taken for signing it.

TINDAL, C. J.—Previous to the Uniformity of Process Act, signing was unnecessary, as, although there are several filacers, so far as concerns the issue of writs, the office of all may be performed by one. The signature of the filacer is a mere private mark for his own convenience; and information might easily be obtained at the office as to who was the filacer who issued the writ. It does not appear to me that the signature is any more necessary now than it was

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WILLIAMS v. BROWN.

WILDE, Serjt., shewed cause against a rule *nisi*, obtained by the defendant in this case, to set aside a writ of *sci. fa.*, on the ground that the time which it had lain in the office was not sufficient, according to the rules of the Court. The application is wrong in form. The writ is good, whether it has or has not lain a sufficient number of days in the office. If any objection can be raised, it is against the proceedings on the writ, and, therefore, the application should have been to set them aside, and not the writ itself.

If there is an objection to proceedings in *sci. fa.*, on the ground that the writ had not lain a sufficient number of days in the office, the defendant should not apply to set aside the writ, but the proceedings thereon.

The Court thought that the application ought to have been against the proceedings and not the writ.

Rule discharged (a).

(a) S. C. 3 M. & Scott, 218.

COOPER v. BLISS.

THIS was an application to discharge a defendant out of the custody of the Warden of the *Fleet*, under the 48 *Geo. 3*, c. 123, he having remained in execution for the space of twelve successive calendar months, for a sum not exceeding 20*l.* The defendant was charged in execution for 42*l.*, but the mode in which that debt was contracted was this:—The defendant originally owed the plaintiff a sum of 15*l.* 10*s.*; interest accrued upon this sum, and for that, with the principal, a promissory note was given. This not being paid after a lapse of nearly two years, the

Under the 48 *Geo. 3*, c. 123, a prisoner is not entitled to his discharge, after remaining in execution twelve months, if the debt exceeds 20*l.*, although the excess consists of interest only, which has accrued after action brought.

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v.
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defendant was sued on it. At the time of bringing the action the principal and interest amounted to 18*l.* 6*s.* 6*d.* The case being referred to the Master on a rule to compute, he found that the principal and interest amounted to 21*l.* 0*s.* 6*d.* The difference between that sum and 42*l.* consisted of costs. It was submitted, that the act meant "debt or damages" due at the time of bringing the action, and not a debt originally less than 20*l.*, increased by damages or interest to more than that sum.

Per Curiam.—The defendant is here in execution for debt and damages, which, by ordinary computation at 5*l.* *per cent.*, exceed 20*l.* According to the words of the act, therefore, the Court has no power to interfere.

Rule refused (*a*).

(*a*) 3 M. & Scott, 797, S. C.

SMITH v. KING.



no objection to the defendant's being allowed to pay money into Court.

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SMITH
v.
KING.

Wilde, Serjt., in support of the rule, contended, that as the action was for general and unliquidated damages, the application could not be entertained.

The Court thought, however, that, under all the circumstances, the 50*l.* might be paid into Court, and said that any further proceedings in the action would be at the risk of costs.

Rule discharged (a).

(a) S. C. 3 Moore & Scott, 799. See also *Hodges v. Lord Lichfield*, *post*; and *Ravenscroft v. Wise & Others*, *ante*, p. 676. By 3 & 4 Will. 4, c. 42, s. 21, it is enacted, "That it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of the said superior courts where such action is pending, or of a Judge of any of the

said superior Courts, to pay into Court a sum of money by way of compensation or amends, in such manner, and under such regulations as to the payment of costs and the form of pleading, as the said Judges, or such eight or more of them as aforesaid, shall by any rules or orders by them to be from time to time made, order and direct." See *Dowling's Practice*, p. 116. For the rules with respect to paying money into Court, under the authority of that act, see 17, 18 & 19 *Reg. Gen. H. T.* 4 Will. 4, *ante*, p. 321.

1833.

DOE *d.* CHARLES *v.* ROE.

An agent of the lessor of the plaintiff may make the affidavit of rent in arrear, required in ejectment on a vacant possession.

ON a motion by *Jones*, Serjt., for judgment against the casual ejector, on a vacant possession, the affidavit of six months' rent in arrear was sworn by a receiver of the lessor of the plaintiff, to whom the rent for many years had been paid, instead of the lessor of the plaintiff, who lived in *Yorkshire*. The premises sought to be recovered were in *London*.

TINDAL, C. J., thought that the affidavit made by the receiver was sufficient.

Rule granted (*a*).

(*a*) S. C. 3 M. & Scott, 751.

RICHARDS *v.* STUART.

In a *capias*, the description of the form of action must, in general, shew that it is one in

WILDE, Serjt., and *Stephen*, Serjt., shewed cause against a rule *nisi* for cancelling the bail-bond in this case on entering a common appearance, on the ground of a misdescription of the cause of action in the *capias*. In

this form. The defendant could not pretend to say, that he had been deceived by this incorrectness, because the amount of debt and costs claimed by the plaintiff was indorsed on the writ. It was contended, by the other side, that the cause of action should have been described as an "action on promises." But here the action was described as an action on the case, which included an action on promises. It must be considered, that the form thus adopted gave as much information to the defendant as the words in the schedule could; for, an "action on promises" might either be *debt* or *assumpsit*.

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 RICHARDS
 v.
 STUART.

Bompas, Serjt., was about to support the rule, when the Court stopped him.

TINDAL, C. J.—It appears to me, that it is better strictly to adhere to the form prescribed by the act of Parliament. But here, the *capias* does not pursue that form, for the action is described as "an action of trespass on the case." As "an action on promises," and "an action of debt," are the only ones in which a defendant can be arrested without leave of the Court; can we say, from description of the action stated in the *capias*, that the defendant has not been arrested in an action of trespass for a *tort*? I think, therefore, that, as the act of Parliament expressly requires the form given in the schedule to be adopted, it ought to be strictly pursued. The defendant, therefore, is entitled to be discharged, on entering a common appearance.

GASELEE, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule absolute (a).

(a) S. C. 3 M. & Scott, 774. 535; *Smith v. Crump*, ante, Vol. 1, See *Pell v. Jackson*, ante, p. 445; p. 519; and *King v. Skiffington*, *Davies v. Parker*, ante, p. 537; ante, Vol. 1, p. 686. *Hodgkinson v. Hodgkinson*, ante, p.

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A discontinuance of the writ, where that is the only step taken, is a discontinuance of the cause. In case of a second arrest, for the same cause of action, it is not necessary to indorse on the process that it was made by leave of the Court; or to make a second affidavit of debt, if both writs are issued by the same officer.

IN the last case, where the rule was made absolute for discharging the defendant out of custody, the Court gave the plaintiff leave to arrest the defendant a second time. He accordingly took out a side-bar rule to discontinue, and paid the costs of discontinuance to the defendant's attorney, obtaining at the same time a receipt for them. The defendant was afterwards arrested and a bail-bond given. A motion was then made to cancel the bail-bond on three grounds: *first*, that there was no indorsement on the writ, that the second arrest had been made by leave of the Court; *secondly*, that the discontinuance of the writ was not a sufficient discontinuance of the action; *thirdly*, that a new affidavit to hold to bail had not been made and filed previous to issuing the second writ. A rule *nisi* having been granted—

Wilde, Serjt., and *Stephen*, Serjt. shewed cause.—The Court having intimated an opinion, that the two first points were untenable, the learned Serjeants addressed their arguments solely to the third. The second writ was here issued by the same officer who issued the first. In

Bompas, Serjt., *contrà*.—As the plaintiff had discontinued his action, he could not commence another on the same affidavit; because the 12 *Geo.* 1, c. 29, s. 2, required the plaintiff to swear to a subsisting debt at the time of suing out the process (a); and although the affidavit might be perfectly true at the time of issuing the first writ, it might not be so at the time of issuing the second. The affidavit here having been used for one specific purpose, it was *functus officio*, and could not be used as the foundation of a second writ. That being the case, perjury could not be assigned upon it. He cited *Dalton v. Barnes* (b), and *Archer v. Champneys* (c).

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TINDAL, C. J.—The defendant has taken three objections to the plaintiff's proceedings. The first is, that there was no legal discontinuance of the former suit. I cannot, however, perceive any rational distinction between a discontinuance of the writ, when that is the only step taken in the action, and a discontinuance of the suit. But, under special circumstances, in *Olmius v. Delaney* (d), the Court refused to set aside a second arrest, although the first suit had not been discontinued. But here, it cannot be pretended that the suit has not been discontinued, when the writ, which is the only step taken in the cause, has been discontinued. Besides, the defendant has admitted by his receipt for the "costs of the cause" as on a discontinuance, that he has received the full benefit of a legal discontinuance of the suit.

The second objection is, that there is no indorsement on the writ of the second arrest being made by leave of the Court. The 2 *Will.* 4, c. 39, s. 4, under the authority of which this *capias* issued, in stating the indorsements which are to be put on the writ, does not mention such a one as is here suggested. Had it been the intention of the legis-

(a) *Kelly v. Devereux*, 1 Wils. 339.

(b) 1 M. & Sel. 230.

(c) 3 J. B. Moore, 608.

(d) 2 Strange, 1216.

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STUART.

lature, that any such should be placed on a direction to that effect would have been introduced.

The third objection is, that a second affidavit of debt ought to have been filed before the second arrest took place. If we consult the language of the 12 Geo. 1, c. 29, s. 2, which provides the manner in which affidavits of debt are to be made, I think all has been done in the present case which that statute required. The defendant has filed an affidavit of the cause of action made before the proper officer. It is not suggested, that the plaintiff is not proceeding for the same cause of action under both writs; and both writs were issued by the same officer; I think, therefore, that a second affidavit was unnecessary. On the part of the defendant, it has been suggested, that perjury could not be assigned on this affidavit, in respect of the second arrest founded on it. I do not agree with that proposition, as the defendant would be estopped from alleging that it was not an affidavit in the cause, when he had availed himself of it, for the purpose of holding the defendant to bail. As to the objection, that, though true at the time of issuing the first writ, it might not be true at the time of issuing the second, that would equally apply to every case, in which there was any delay between making the affidavit and issuing the writ.

view; and on consulting the Judges of the other Courts, they concur with us in opinion.

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GASELEE, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule discharged (a).

(a) S. C. 3 M. & Scott, 778. See *Cogrim v. Poster*, post.

BRAZIER v. BRYANT.

TADDY, Serjt., shewed cause against a rule, requiring an arbitrator to refund a sum of money which it was alleged he had been overpaid. It appeared, that, in the year 1825, the cause was referred to an arbitrator, and the amount of his fees and expenses, 87*l.*, was paid by the plaintiff's attorney. That attorney had since died. An application was made, in the year 1827, to reduce the amount of the arbitrator's claim, when, after a reference to the Prothonotary, at the instance only of the defendant, that officer, on taxation, allowed 35*l.* The object of the present application was to compel the arbitrator to refund the excess. The learned Serjeant contended, that, after a lapse of nearly eight years, the Court would not interfere as required.

After a lapse of eight years, the Court will not interfere to compel an arbitrator to refund a sum of money alleged to have been over-paid, particularly where the party who could explain the transaction is dead.

TINDAL, C. J.—We think, that we cannot, after such a lapse of time, interfere by directing an inquiry into this transaction; more particularly when the attorney who paid the money, and who might have explained the transaction, is dead. The present rule must, therefore, be discharged, and with costs.

Rule discharged, with costs (a).

(a) S. C. 3 M. & Scott, 814. See also pp. 600, 477, *ante*; and *Ex parte Shipden*, 6 D. & R. 338.

1833.

LATREILLE v. HOEPNER.

An affidavit of debt for principal and interest due on a bill of exchange must shew what amount is due for principal independent of interest.

WILDE, Serjt., shewed cause against a rule *nisi* for discharging the defendant out of custody on entering a common appearance, on the ground of a defect in the affidavit of debt. It was on a bill of exchange for "the sum of 70*l.* 11*s.* 6*d.*, the balance of principal and interest due on a bill of exchange for the sum of 100*l.*" This he contended was the common form in such cases, and that it was not usual in practice to separate principal and interest.

Andrews, Serjt., in support of the rule, submitted, that it was consistent with the allegation in the affidavit, that the sum really due for principal was not sufficient to warrant the arrest.

Per Curiam.—If the terms of the affidavit are such, that by any construction the arrest will appear to be unlawful, it is defective, and the defendant cannot be detained in custody.

Rule absolute (*a*).

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WETTENHALL v. WAKEFIELD.

TADDY, Serjt., shewed cause against a rule *nisi* for entering a suggestion to deprive the plaintiff of his costs pursuant to the 39 & 40 Geo. 3, c. civ., (the *London Court of Requests Act*), on the ground that the plaintiff had recovered a sum less than 5*l*. The affidavit of the defendant stated him to be a barrister resident in *King's Bench Walk, Inner Temple*, and that he was liable to be summoned under the *London Court of Requests Act*. The learned Serjeant contended, that, as attornies, plaintiffs, were not compellable to sue in that court, so barristers could not be considered as within the act which instituted it, they filling a higher rank in the profession.

A barrister resident within the jurisdiction of the 39 & 40 Geo. 3, c. civ., (the *London Court of Requests Act*) must be sued in that Court for claims under 5*l*.

Jones, Serjt., *contra*, cited s. 10 of the act, which rendered "all attornies, solicitors, and officers" liable to the process of the Court of Requests in the same manner as any other persons subject to it.

Cur. adv. vult.

Per Curiam.—On examining the language of the act, we see no ground for determining that a barrister is exempt from the jurisdiction of this Court of Requests. The 10th section, in its preamble, recites, that doubts have existed whether attornies and solicitors and other officers of any of the Courts of law or equity were subject to the process of the Court. The clause commencing by the enumeration of attornies and solicitors, the general word "officer" cannot be considered as referring to persons in the profession of a higher degree than attornies and solicitors. The recited doubts, therefore, cannot have referred to barristers, if indeed they can strictly be considered as officers of the Court. They therefore will

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v.
WAKEFIELD.

come within the general words of sect. 5. The present rule must, therefore, be made absolute.

Rule absolute (a).

(a) S. C. 3 M. & Scott, 805.

MOORE v. THOMAS.

If a sheriff does not indorse on the *capias* the day of its execution pursuant to 4 *Rag. Gen. M. T. 3 Will. 4*, the remedy is, to require him to amend his return, and make compensation to the plaintiff for damages accruing through his neglect.

IN this case a writ of *capias* was sued out, directed to the Sheriff of Cornwall. It was executed by him; but he neglected to indorse within six days after the execution the true day of that execution, pursuant to the directions of 4 *Rag. Gen. M. T. 3 Will. 4* (a).

Wilde, Serjt., now applied for a rule *nisi* for an attachment for not making the required indorsement.

TINDAL, C. J.—The penalty imposed by the rule itself is that the sheriff “shall be liable in a summary way to make such compensation for any damage that may result from his neglect as the Court or Judge shall direct.” That

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NICOL v. BOYNE.

PHEN, Serjt., shewed cause against a rule *nisi* for urging the defendant out of custody on entering a plea on appearance, on the ground of a variance in the copy of the *capias* from the original writ issued. The writ itself was directed to the "sheriffs" of *London*, but the copy delivered to the defendant was directed to the "sheriff" of *London*. The whole variance therefore between the copy and the original consisted in the omission of the letter "s." When the 2 *Will.* 4, c. 39, s. 4, required a copy of the *capias* to be delivered to the defendant, it did not mean a *fac simile* of the writ, but merely a substantial copy. The mere omission of a letter could not vitiate its being a copy within the fair and sensible meaning of the act. The object of serving the copy was to enable the defendant to know what was the nature of the sheriff's demand. The mere omission of the letter "s" could not prevent his obtaining that knowledge. He cited *Clutterbuck v. Wildman* (a), as justifying in principle the answer he gave to the objection.

The copy of a *capias* directed to the "sheriff" instead of the "sheriffs" of *London* is defective.

DALE, C. J.—In all such cases as the present I think it better to adhere strictly to the form given by the statute. It prevents the difficulties which arise from discussing what is an important and what an unimportant variance. A copy required by the statute to be delivered to the arrested ought of course to be a true copy. The writ here is in fact directed to a non-existing officer; for there is no sheriff of *London*, as that city has two sheriffs by the grant of King *John*. The present rule must, therefore, be made absolute.

SELEE, J., and **BOSANQUET**, J., concurred.

(a) 2 Tyrw. 276.

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ALDERSON, J., concurred, and said, that if the defect had consisted merely in bad spelling, as if "sheriffs" had been spelt with one "f," perhaps the objection might not have been fatal.

Rule absolute (a).

(a) S. C. 3 Moore & Scott, 812. *Storr v. Mount*, ante, p. 417; and See *Byfield v. Street*, ante, p. 739; *Richards v. Stuart*, ante, p. 754.

DICAS v. WARNE.

A plaintiff may sue out a *ca. sa.* before the return of a *fi. fa.* previously issued, if the latter writ has not been executed.

WILDE, Serjt., shewed cause against a rule *nisi* for discharging the defendant out of custody, on the ground of his having been improperly arrested on a *ca. sa.* before the return of a *fi. fa.* previously issued against his goods. The facts of the case were these:—The plaintiff sued out a *fi. fa.* on the judgment previously obtained against the goods of the defendant. When the officer went to the premises for the purpose of executing the writ, he found the goods had already been seized under a distress for rent and taxes. On further inquiry, he discovered, that, previous to the issue of the *fi. fa.*, the defendant had exe-

Jones, Serjt., supported the rule, and contended, that, where the *fi. fa.* was executed, the plaintiff must wait until its return before he could sue out a *ca. sa.* But execution of the writ merely meant taking possession of the goods, and here, certainly, possession had been taken, although, from circumstances, no proceeds had come to the hands of the plaintiff. He cited *Lawes v. Codrington* (a), in which *Parke, J.*, observed, "If you execute the *fi. fa.* you cannot take another step till the following term; for that writ cannot be returned into Court, until the Court, in contemplation of law, is sitting." In *Miller v. Parnell* (b), it was held, that, if a sheriff makes a seizure under a writ of *fi. fa.*, the plaintiff cannot take the defendant in execution, under a writ of *ca. sa.*, till the *fi. fa.* is returned, though he abandons the seizure of the goods.

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DICKS
&
WARNE.

TINDAL, C. J.—This case is decided by that of *Edmond v. Ross* (c), where this precise point arose. The attention of the Court was there drawn to the case of *Miller v. Parnell*. We must, therefore, consider the latter case overruled. The present is distinguishable from that of *Lawes v. Codrington*, as there a sum of 17*s.* 6*d.* was levied under the *fi. fa.* The present rule must be discharged.

GASELEE, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule discharged (d).

(a) *Ante*, Vol. 1, p. 30.

(c) 9 Price, 5.

(b) 6 Taunt. 370; 2 Marsh. 78,
S. C.

(d) 3 M. & Scott, 814. ; S. C.

1833.

STAPLES *v.* PURSER and WIFE.

It is necessary to obtain leave of the Court to enter up judgment against husband and wife on a warrant of attorney, executed by the wife *dum sola*.

MOTION to enter up judgment on an old warrant of attorney against husband and wife. It had been given by the latter previous to her coverture.

Per Curiam.—You may take your rule.

Rule granted (*a*).

(*a*) S. C. 3 M & Scott, 800. R. 117, and *Metcalf v. Boote*,
See *Hartford v. Mattingly*, 2 Chit. 6 D. & R. 46.

SMITH *v.* FIELDER.

If a party to a reference revokes the arbitrator's authority without a sufficient cause, he will be compelled to pay all the costs of the reference.

TADDY, Serjt., and *Andrews*, Serjt., shewed cause against a rule *nisi*, requiring the defendant to pay the costs of the reference in this case. The cause had been referred pursuant to an order of *Nisi Prius*, which, among other conditions, directed that the arbitrator should be at liberty to examine either party; that the death of neither

the defendant had no right to revoke the authority of the arbitrator. The learned Serjeants contended, that, under the circumstances, the plaintiff had a right to revoke the arbitrator's authority; and they cited *Aston v. George (a)*, and *Green v. Pole (b)*.

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SMITH
v.
FIELDER.

Wilde, Serjt., supported the rule.

Per Curiam.—Had the defendant desired to make the death of the plaintiff a ground for revoking the arbitrator's authority, he should have made that one of the terms of his submission. But no such term is introduced; on the contrary, it is expressly provided, that it shall not operate as a revocation; and, therefore, that cannot have been the reason of his revoking the arbitrator's authority, as, after he knew of the plaintiff's death, he permitted the reference to proceed, and kept possession for a considerable time of the admissions transmitted to him. This conduct was inconsistent with the idea of his thinking the arbitration to be at an end. Had he been anxious to avail himself of the plaintiff's evidence, he should have made that a condition of submitting to the arbitration. From the whole circumstances of the case, it does not appear that the defendant really intended to examine the plaintiff as to this matter. As, on considering all the facts of the case, the defendant does not appear to have had a reasonable cause for revoking the authority of the arbitrator, we think that he is bound to pay all the costs occasioned by that revocation.

Rule absolute (c).

(a) 2 B. & Ald. 395; 1 Chit. R. 204, S. C.

(b) 4 M. & P. 198.

(c) S. C. 3 M. & Scott, 853. See 3 & 4 Will. 4, c. 42, s. 39, by which it is provided, that the au-

thority of an arbitrator cannot be revoked without leave. See further ss. 40 and 41 of the same act as to other matters connected with references; and Dowling's Prac. 158.

1833.

COOMBS v. DOD.

The time for rendering a bankrupt defendant in discharge of his bail will not be enlarged in the case of a London fiat.

WILDE, Serjt., shewed cause against a rule obtained at the instance of the bail for staying proceedings on the *ca. sa.* sued out against them, on the ground of the defendant becoming bankrupt. It was a *London* fiat, and therefore the inconveniences suggested in *Glendinning v. Robinson* (a), could not arise, that being the case of a country commission.

Per Curiam.—There is nothing to prevent the bail from rendering their principal. If the bankrupt is required to be examined, he may be brought up under a commissioner's warrant. The case of *Shaw v. Cash* (b) is in point. This is not a case in which the Court ought to interfere as prayed.

Rule discharged (c.)

(a) 1 Taunt. 320.

(b) 12 J. B. Moore, 257; 4 Bing. 80, S. C.

(c) S. C. 3 M. & Scott, 817.

See *Ruston v. Green and Robson*, ante, 617.

come within the principle of *Shillito v. Theed* (a), in which case the action must have been for more than 20*l*. When the defendant found that his witness was absent, he might have applied to postpone the trial on terms.

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HENNING
v.
SAMUEL.

Rule refused (b).

(a) 4 M. & P. 575.

See *Edwards v. Dignam*, ante, p.

(b) S. C. 3 M. & Scott, 818. 642, *contrd.*

VANSANDAU and Another v. NASH.

TALFOURD, Serjt., shewed cause against a rule for setting aside an order of a Judge for staying proceedings in actions against two bail, on payment of the amount of one recognizance and the costs of those actions. He contended, that, according to the fair construction of 1 *Reg. Gen. H. T. 2 Will. 4*, s. 21 (a), the bail could only be considered as liable to the single amount of one recognizance. The learned Judge was therefore correct in the order he had made. The words of the rule are, "Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance." In the present case, however, the amount of the debt and costs recovered by the plaintiff in the original action was 179*l*. 7*s.*, while the amount sworn to at the time of arresting the defendant was only 50*l*. The recognizance, therefore, was in 100*l*. To the extent of this latter sum the defendant's liability must be confined.

Bail are only liable by 1 *Reg. Gen. H. T. 2 Will. 4*, s. 21, to the extent of the single amount of one recognizance, although the sum recovered with costs of suit amounts to more.

Wilde, Serjt., supported the rule.

Cur. adv. vult.

(a) *Ante*, Vol. 1. p. 186.

1833.

VANSANDAY
v.
NASH.

TINDAL, C. J.—This case depends upon the construction to be put on the rule of *Hilary Term, 2 Will. 4*; and the question is, whether the words, “the amount of their recognizance,” means the amount of the two separate recognizances added together, or the amount of the sum mentioned in each of their recognizances. On consulting the Judges of the other Courts, a great majority of them concur with us in thinking that they are only liable for the sum mentioned in each of their recognizances. The learned Judge, therefore, was right in the opinion he formed, as to the meaning of the rule, and the order he made upon it. The present rule, therefore, must be discharged.

Rule discharged (a).

(a) S. C. 3 M. & Scott, 834. See *Hunt v. Round and Another*, *ante*, p. 558.

REGULÆ GENERALES.



FINES AND RECOVERIES.

1833.

Fines and recoveries.

WHEREAS, by the 84th section of the statute made in the 3rd and 4th years of the reign of his present Majesty, chapter 74, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance," the Court of *Common Pleas* is authorized from time to time to make alterations in the memorandums and certificates in the said section mentioned.

And whereas, by the 89th section of the said act it is enacted, "That the Lord Chief Justice of the Court of *Common Pleas* at *Westminster* shall from time to time appoint the person who shall be the officer with whom such certificates as in the said act are mentioned shall for the time being be lodged, and may remove him at pleasure; and that the Court of *Common Pleas* at *Westminster* shall also from time to time make such orders and regulations as the said Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the said act, and touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place:" Now IT IS ORDERED, that, in addition to the form of the certificate mentioned in the 84th section of the said act, after stating the names of the parties and the words "and acknowledge the same to be her act and deed," the following words should be inserted, "And I [*or we*] do further certify that the several premises comprised in the said indenture are situate in the parish [*or several parishes*] and place [*or places*] following, that is to say, in the parishes of — [*as the case may be*], in the county of —."

Certificate.

AND IT IS FURTHER ORDERED, that, where the acknowledgment shall be made before commissioners appointed un-

One of the commissioners at the least not to be

1833.

concerned for
the parties.

Form of affida-
vit.

der the said act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any of the parties in the transaction giving occasion to the taking such acknowledgment; and that in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof, that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any of the said parties; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken shall be mentioned in such affidavit.

Inquiry to be
made of mar-
ried woman.

AND IT IS FURTHER ORDERED, that the commissioners do inquire of married women whether they intend to give up their interest in the estate to be passed by such deed, without having any provision made for them in return for,

AND IT IS HEREBY FURTHER ORDERED, that the affidavits verifying such certificate, where the acknowledgment is taken by a Judge or Master in Chancery, be in the form hereunto annexed marked A.; and where before any of the commissioners appointed in pursuance of the said act, in the form hereunto annexed marked B., with such variations only as the circumstances of the case shall render necessary.

1833.
Affidavits verifying certificates.

AND IT IS HEREBY FURTHER ORDERED, that the certificates and the affidavits verifying the same shall be delivered to the officer to be so appointed within one month from the making the acknowledgment, and that the officer shall not receive the same after that time without the direction of the Court or a Judge.

Certificates and affidavits to be delivered within one month to the proper officer.

A.

Form of Affidavit verifying the Certificate where the Acknowledgment is taken before a Judge or Master in Chancery.

A. B., of —, maketh oath and saith, that he knows —, the wife of —, in the certificates hereunto annexed mentioned: And that the acknowledgment therein mentioned was made by the said —, and the said certificate signed by the said — [Judge or Master], therein mentioned, in the presence of this deponent: And this deponent further saith, that the said — was at the time of making such acknowledgment of full age and competent understanding.


B.

Form of Affidavit verifying the Certificate where the Acknowledgment is taken by any of the Commissioners appointed in pursuance of the Act of Parliament.

A. B., of —, in the county of —, gentleman, one of the attornies of his Majesty's Court of —, at *Westmin-*

1833.

~~that~~, and one of the commissioners named in the certificate herunto annexed, maketh oath and saith, that he knows ~~the~~ the wife of —, in the said certificate mentioned, and ~~that the~~ acknowledgment therein mentioned was made by ~~the said~~ —, and the certificate signed by the commissioners in the said certificate mentioned, on the day and year therein mentioned, at —, in the county of —, in the presence of this deponent; and that, at the time of making such acknowledgment, the said — was of full age and competent understanding; and that the said — knew the ~~same~~ acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made: And this deponent further saith, that he, this deponent, [*or, the said I. K., as the case may be, adding, if not the commissioner making the affidavit,* whose place of residence is at —], is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any or either of the parties to the transaction giving occasion to the taking such acknowledgment: And this deponent further saith, that, in pursuance of the order made by the Court of *Common Pleas*, in *Michaelmas Term*, 1833, the said commissioners did inquire of the said — [*or, if more than one, of each of them the said*



ponent, before her acknowledgment was so taken, was satisfied, and does now verily believe, that such provision has been made.

1833.

N. B.—When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.

(Signed by the Judges of this Court.)

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILL. IV.

1834.

Ex parte ATKINSON.

IN this case Mr. *Atkinson*, who was a clerk in the Letter Bill Office, appointed by and employed under the Postmaster-General, was summoned to attend as a juror at the Sittings in this Court at *Westminster* during the present term.

By the operation of 6 Geo. 4, c. 50, s. 1, upon the letters patent appointing the Postmaster-General, all deputies and officers appointed by him are exempted from serving as jurors.

Wilde, Serjt., applied to have him discharged from attending his summons, on the ground of his not being liable to serve as a juror in consequence of his appointment in the *Post Office*. By the letters patent under the great seal, dated 4th *April*, 1831, appointing the Duke of *Richmond* Postmaster-General, it was commanded that, besides the Duke of *Richmond*, “all deputies and officers to be by him appointed” shall not be compelled to serve as jurymen. The 1st section of the 6 Geo. 4, c. 50, exempted from serving as jurors all persons who were exempt “by virtue of any prescription, charter, grant, or writ.” Mr. *Atkinson*, therefore, must be considered as

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Ex Parte
ATKINSON.

coming within the meaning both of the letters patent and of the statute.

Cur. adv. vult.

TINDAL, C. J. said, that he had consulted the other Judges, and that they were unanimously of opinion, on comparing the letters patent with the words of the statute, that the applicant was exempt from serving as a juror.

Application allowed (a).

(a) S. C. 4 M. & Scott, 160.

CLARK v. MARNER.

A writ of trial should be directed to the "Judge" of an inferior court of record, although the 3 & 4 Will. 4, c. 42, s. 17, only speaks of "sheriff" as the person to whom the writ is to be directed. Where the trial

THIS was an application by *Bompas*, Serjt., to set aside a writ of trial and all proceedings upon it on two grounds:—
First, because the writ was directed to the Mayor of *Colchester*, while the 3 & 4 Will. 4, c. 42, s. 17, only authorized the direction to the sheriff; and, *secondly*, because the issue had been tried before the deputy of the mayor, it not appearing that he had power to appoint a deputy. The affidavits on which he moved did not however clearly

the writ may now be directed to such a judge where there is a court of record, and to the sheriff where there is none. The direction therefore of the writ to the mayor is correct. As it has not been shewn to us that the mayor has no power to appoint a deputy, I think the trial was regular. I do not think, therefore, that the rule which is prayed ought to be granted.

1834.
CLARK
v.
MARNER.

Rule refused (a).

(a) S. C. 4 M. & Scott, 171.

DOE *d.* TUCKER *v.* ROE.

MOTION for judgment against the casual ejector. The service was on the foreman of the tenant in possession, with an acknowledgment by the wife on the first day of term of the receipt of the declaration, and an admission by her that she had communicated it and the necessary explanation to her husband. Service in ejectment.

Per Curiam.—The admission of the wife in this case cannot affect the husband.

Rule refused (a).

(a) S. C. 4 M. & Scott, 165.

1834.

FREEMAN v. PAGANINI.

The plaintiff has a right to the costs of applying to take money out of Court, which has been paid in in lieu of bail.

WILDE, Serjt., applied after verdict to take money out of Court paid in by the defendant in lieu of special bail. The question was, whether the plaintiff was entitled to the costs of the application? Mr. *Chapman* in his book of Practice (a) said, that it was the practice in the *King's Bench* to allow such costs.

Per Curiam.—It is consistent with justice that he should have those costs.

Rule accordingly (b).

(a) Page 137.

(b) S. C. 4 M. & Scott, 165.

HORNE v. TOOK.

A declaration delivered, although in disobedience to an

ANDREWS, Serjt., moved to set aside a declaration and subsequent proceedings on the ground of irregularity.

1834.

SURMAN v. BRUCE.

ANDREWS, Serjt., shewed cause against a rule for entering an *exoneretur* on the bail-piece. The facts were, that after the cause was at issue the plaintiff, with the consent of the bail, took the defendant's *cognovit* for the debt and costs. The defendant making default on the 8th *May*, 1832, at which time the money ought to have been paid, on the 10th of that month the plaintiff sued out a *ca. sa.* This was returned *non est inventus*. In the month of *December*, 1833, the defendant died, and, on the 7th *January*, 1834, the plaintiff wrote to the bail demanding payment of the debt and costs. Throughout this time the plaintiff had given them no notice whatever of the defendant having made default, of his having sued out the *ca. sa.* The object of the present rule was to relieve the bail by entering an *exoneretur* on the bail-piece, on the ground that the plaintiff had been guilty of laches in giving time to the defendant without notice to the bail. There were however two objections to the application: *first*, because it was too early, as no proceedings had been taken against the bail; and, *secondly*, that they did not deny their knowledge of the defendant's default. He cited *Rawlinson v. Gunston* (a).

If a security for debt and costs is taken by a plaintiff from the defendant with the consent of the bail, and that security fails, reasonable notice must be given to them of that failure before proceedings can be taken against them.

Wilde, Serjt., in support of the rule cited *Clift v. Gye* (b), and *Charleton v. Morris* (c).

TINDAL, C. J.—It appears to me that this case comes within the principle laid down in *Clift v. Gye*. There, it was decided, that if, in consequence of a negotiation time was given to the principal, and the case thereby taken out

(a) 6 T. R. 284.

(b) 9 B. & C. 422.

(c) 4 M. & P. 114; 4 Bing. 627, S. C.

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 SURMAN
 v.
 BRUCE.

of the ordinary course, the bail are entitled to reasonable notice if that negotiation fails, so that they may secure themselves by a render. But here no notice was given, although it is contended that the conclusion must be that they knew of the default. It is not sufficient, however, that they must be taken to have known of it; for they had a right to such a notice as would enable them to adopt measures for their own indemnity. With respect to the costs, as the plaintiff has taken no proceedings on their recognizance, and they come to ask a favour of the Court, I think the rule should only be made absolute on payment of costs.

PARK, J., GASELEE, J., and ALDERSON, J., concurred.

Rule accordingly (a).

(a) S. C. 4 M. & Scott, 184.

SHINFIELD v. LAXTON.

A defendant
 may move for
 judgment as in
 case of a nonsuit

WILDE, Serjt., shewed cause against a rule for judgment as in case of a nonsuit, the plaintiff not having pro-

cause down to trial by proviso, was of opinion that it was not necessary previous to an application for judgment as in case of a nonsuit.

1834.

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 v.
 LAXTON.

The rest of the Judges concurred.

Rule discharged on a peremptory
 undertaking (a).

(a) S. C. 4 M. & Scott, 187.

BARHAM v. LEE.

WILDE, Serjt., shewed cause against a rule for setting aside proceedings for irregularity. Having entered into the merits, he took a formal objection to the affidavit in support of the rule, that it was dated *January*, 1833, instead of *January*, 1834.

An objection to an affidavit on which a rule was obtained is not waived by appearing to oppose the rule, and even entering into the merits.

Adams, Serjt., in support of the rule, submitted, that going into the merits waived the formal objection.

The Court referred to *Clothier v. Ess* (a), where the Court held, that to appear, as in the present case, did not waive a formal objection to the affidavit. In conformity with that case they now decided.

Rule discharged (b).

(a) *Ante*, p. 731; 3 M. & Scott, 216, S. C. (b) S. C. 4 M. & Scott, 327.

1834.

COWELL v. BETTELEY.
SAME v. SNOW and Others.

A reference of all matters in difference between parties cannot, under 1 *Reg. Gen. H. T. 2 Will. 4, s. 93*, affect the attorney's lien.

THESE two causes, with all matters in difference, were referred by an order of *Nisi Prius* to an arbitrator, with directions to him to determine for what amount the verdicts were to be entered: the costs to abide the event in each case. In the first cause, he directed a verdict to be entered for the plaintiff with 100*l.* damages; in the second, he directed a verdict to be entered for the defendant. His award then went on to find the plaintiff to be indebted to *Betteley* to the extent of 86*l.* 11*s.* 6*d.*; and then he directed that that sum, with the defendant's costs in the second action, should be set off against the plaintiff's damages and costs in the first. A rule *nisi* was afterwards obtained at the instance of the plaintiff's attorney for setting aside that part of the award which directed a set-off of damages and costs in the two actions, as that was contrary to the rule of 1 *Reg. Gen. H. T. 2 Will. 4, s. 93 (a)*; the terms of which were, that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought."

agreement between the parties themselves could, according to the language of the rule of Court, have deprived the attorney of his lien for costs. I think, that, by referring the cause, they do not increase their power to effect a set-off, and therefore I think that the set-off directed by the arbitrator cannot be carried into effect. Execution may therefore issue for the costs of the first action; notwithstanding the award.

1834.
 }
 COWELL
 v.
 BETTELEY.

Rule absolute accordingly (a).

(a) S. C. 4 M. & Scott, 265.

HUBER v. STEINER.

TADDY, Serjt., shewed cause against a rule *nisi* for leave to the defendant to add a plea to those already put on the record. It was an action on certain promissory notes against the defendant as drawer. At the time of making the notes, in the year 1813, and for more than five years after they became due, both parties were domiciled at *Mulhausen* in *Upper Saxony*, then subject to the *French* government, and governed by *French* law. According to that law, the plaintiff would be barred in five years. The present action was begun in *May*, 1833, a declaration delivered in *October*, and issue joined on the 14th *January*, 1834. The defendant had pleaded, first, the general issue; and, secondly, the Statute of Limitations. The plaintiff replied that he was abroad until within six years of the action being commenced. The object of the present application was to add another plea, shewing that, by the *French* law, the lapse of five years had barred the plaintiff's right of action. The learned Serjeant said, that the plaintiff was willing to allow the matter of the proposed plea to be given in evidence under the general issue.

The Court will, on terms, in an action on a foreign promissory note, even after issue joined, allow a defendant to put in a plea, shewing that, by the foreign law, the plaintiff's right of action is tolled by lapse of time.

1834.

HUBER
v.
STEINER.

This would have all the effect the defendant could wish, and would prevent the necessity which might otherwise probably arise of compelling the plaintiff to give evidence which must be adduced from a foreign country.

Bompas, Serjt., supported the rule.

TINDAL, C. J., with the concurrence of the other Judges, directed the rule to be made absolute on the terms of all the costs incident to the motion being paid by the defendant, the handwriting of the latter to the notes being admitted, and judgment of the term given if the plaintiff should obtain a verdict.

Rule absolute accordingly (a).

(a) S. C. 4 M. & Scott, 329.

REX v. The Sheriff of ESSEX, in LEVY v. PAINE.

5 Reg. Gen. T.
T. 1 Will. 4, as
to changing bail,
applies to bail
put in by the
sheriff as well

WILDE, Serjt., shewed cause against a rule for setting aside an attachment against the sheriff. The attachment had been directed to stand as a security on account of bail not having been put in in due time in the right county. *Wilde* shewed that bail had been put in, and the defendant was rendered absolute on changing bail had been ob-

s.20 (a), (it was ordered, that "bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance." But, under the circumstances, the sheriff must make the best terms he can with the plaintiff.

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Rule discharged (b).

(a) *Ante*, Vol. 1, p. 186.

(b) S. C. 4 M. & Scott, 247.

KENDALL v. ALLEN.

IN this case costs were due from the plaintiff's son to the defendant, who was an attorney. The latter held in his hands a bond from the son to the plaintiff. Afterwards the son becoming bankrupt, and the defendant claiming a lien on the bond, the plaintiff agreed to pay the bill of costs out of the proceeds resulting from proving the bond under the commission, provided the defendant would give up the bond. The debt on the bond was accordingly proved, and a dividend received. Two bills were then made out, one for business done under the commission, and the other for business on account of the son. These bills the plaintiff had taxed, and the defendant retained their amount as well as that of a sum of money advanced by him to her. The plaintiff then gave a receipt for the residue of the dividend in these terms, "being the balance of the dividends received on her account." An action was then brought for the recovery of the sum retained by the defendant for the son's bill. A rule *nisi* was obtained to stay proceedings, on the ground of the action being brought against good faith.

If a party taxes the bill of an attorney for costs due from a third person and pays that bill, he cannot afterwards recover the amount without shewing the payment to have been made through ignorance or misrepresentation; and if an action be brought the Court will stay proceedings.

Jones, Serjt., shewed cause against this rule, on affidavits, which unsuccessfully attempted to shew that the plaintiff

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had been induced by misrepresentations to allow the **amount** of the son's bill to be retained.

Wilde, Serjt., supported the rule.

TINDAL, C. J.—It does not appear that the plaintiff in this case agreed to pay her son's bill from either ignorance or misrepresentation. On the contrary, she had the bill taxed, and made no objection. If she had thought any imposition had been practised upon her, she ought to have come to the Court then. There can be no reason for permitting this action to proceed.

PARK, J., GASELEE, J., and ALDERSON, J., concurred.

Rule absolute (a).

(a) S. C. 4 M. & Scott, 319.

SKIPPER v. LANE.

A sheriff is early enough in his application, if he

THIS was a sheriff's rule under 1 & 2 Will. 4, c. 58, s. 6 (a). The sheriff seized under a *fi. fa.* on the 9th

contended, on the authority of *Cook v. Allen* (a), that the application was too late.

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The Court thought the delay of the sheriff not unreasonable, particularly as the notice of the fiat was only notice of an expected claim.

The rule was afterwards made absolute on certain terms (b).

(a) *Ante*, p. 11. 211, 3 M. & Scott, 341; 10 Bing. 3,
 (b) S. C. 4 M. & Scott, 283. and *Bishop v. Hinzman*, *ante*, 166.
 See also *Isaac v. Spilsbury*, *ante*,

COPPIN and Wife, Administratrix of J. PLURA, deceased,
 v. POTTER.

THIS was an action to recover principal and interest on a bond made by the defendant to the deceased for the payment of 1200*l*. The defendant had been arrested in the county of *Cornwall* on an *alias capias*, the former writ having been issued to the Sheriff of *Sussex*; the *præcipe* for the second writ was filed with the deputy filacer for *Cornwall*, who was also deputy for *Sussex*. The plaintiff, however, did not make a second affidavit of debt, or file an office copy of the former one, previous to issuing the *alias*. A rule *nisi* was moved for to discharge the defendant out of custody, on entering a common appearance, on various grounds. The *first* objection was, that the affidavit did not contain a sufficient addition of the deponent or statement of his place of abode, he being described as "of *Bath*, in the county of *Somerset*." The *second* objection was, that the defendant was stated to be indebted to the

"*Bath*, in the county of *Somerset*, Esq.," is a sufficient description in the *Common Pleas* of a deponent in an affidavit of debt.

In such an affidavit it is not incorrect to allege the defendant to be indebted to the plaintiff and his wife, administratrix.

If the debt was to the intestate on bond, the death of the latter need not be alleged, nor to whom the payment was to be made.

To warrant an *alias capias* into

a second county, a fresh affidavit of debt, or a copy of the previous one, need not be filed if the writ is sued out by an officer, who is deputy filacer for both counties.

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plaintiff and his wife, administratrix of *J. Plura*, although the plaintiff took no interest in the debt, he being merely joined for the sake of conformity. *Thirdly*, it was not stated that *J. Plura* died intestate. *Fourthly*, that it omitted to state to whom the money secured by the bond was to be paid. *Fifthly*, that there was no affidavit to warrant the issuing of the second writ.

The Court granted a rule *nisi* on the first, second, and fifth grounds, and overruled the third and fourth.

Talfourd, Serjt., shewed cause, and contended, on the first point, that it was not necessary, according to the practice of the Court of *Common Pleas*, to insert, as in the *King's Bench*, the true place of abode and addition of the deponent; and he cited *Anonymous* (a). As to the second point, it was not necessary to allege the cause of action in an affidavit of debt as precisely as in a declaration. He cited *Cowell v. Watts* (b), *Ankerstein v. Clarke* (c), *Philiskirk v. Pluckwell* (d), and *Buckworth v. Levi* (e). With respect to the third point, he contended, that, as the two writs were issued by the same officer, who was deputy of the filacers for both counties, it was unnecessary to make a second affidavit, or file a copy previous to issuing the

issued the two writs in the present instance, although he acted for different counties, and the second was clearly in continuance of the first. The plaintiff here adopted the course prescribed by the Uniformity of Process Act. The second writ had been sued out, pursuant to sect. 10 of that act, within one calendar month after the expiration of the preceding writ, and, according to the directions of 6 *Reg. Gen. M. T.* 3 *Will.* 4 (a), the *alias* referred to the preceding writ as directed to the sheriff, to whom it was in fact directed.

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Wilde, Serjt., supported the rule, and admitted that, upon reviewing all the authorities, the Court had in *Richards v. Stuart* determined, that where a defendant is arrested on a second writ sued out by the same officer, a new affidavit of debt or office copy of the one already made need not be filed. In that case, however, the two writs were directed to the same sheriff; but, in the present instance, the affidavit of debt was filed with the filacer of *Sussex*, and the *præcipe* for the second writ was filed with the filacer for *Cornwall*. The fact of the same person being deputy filacer for the same counties made no difference. Great doubt existed whether perjury could be assigned on an affidavit made under such circumstances. He cited *Ex parte Campbell* (b), *Dalton v. Barnes* (c), *Beck v. Young* (d). As to the first point, with respect to the description of the deponent, it was by no means sufficiently definite; and, as to the second point, he cited *Curry v. Stephenson* (e), *Beamond v. Long* (f), *Wentworth's Office of Executors*, *Rolle's Abr.* tit. "*Executors*," (P), pl. 3—10.

Cur. adv. vult.

(a) *Ante*, Vol. 1, p. 471.

(b) 2 *Rose*, B. C. 51.

(c) 1 *M. & Sel.* 231.

(d) *Ante*, p. 462.

(e) 4 *Mod.* 376; *Skin.* 555;

Salk. 421; *Comb.* 311; *Cro. Eliz.* 112—537; *Latch*, 212.

(f) *Cro. Car.* 208, 227; and *Sir W. Jones*, 248.

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TINDAL, C. J.—It appears to me, that, since the passing of the 2 & 3 Will. 4, c. 39, s. 10, by which it is provided that “every writ of *capias* may be continued by *alias* and *pluries*,” and the promulgation of 6 Reg. Gen. M. T. 3 Will. 4, which directs the manner of carrying the enactment into effect, the only mode of continuing a summons or a *capias* into a second county is by an *alias*. This writ is, therefore, in substitution of the old *testatum*. The second writ it appears was sued out in continuance of the first writ, within one month after the expiration of the first, according to the provisions of the above section. The second must, therefore, be treated in the same manner as the old *testatum*. That brings it within the case of *Boyd v. Durand*. In that case, it was held, that where one person filled the office of deputy filacer for *Middlesex* and *Surrey*, an affidavit of debt having been filed with the filacer for *Middlesex*, it was unnecessary to file either a new affidavit or an office copy of the old one previous to issuing a second writ into the county of *Surrey*.

As to the other objections, we think an affidavit of debt ought not to be construed with the same degree of strictness as a declaration to which there is a special demurrer; more particularly as the object of the affidavit is attained. The present rule must therefore be discharged.

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WHEREAS it has been found expedient to make alterations in the General Rules made in *Michaelmas* Term last by this Court (a) for the purpose of carrying into effect the statute passed in the 3rd and 4th years of the reign of his present Majesty, cap. 74, intituled “An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.”

And whereas it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution; and it will be convenient that all the orders and regulations made by the Court under the said act should be contained in the same rule.

Now, it is hereby ordered that the said general rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which before the 1st day of *March* next ensuing shall have been taken pursuant to the direction of the said rules of *Michaelmas* Term last.

Rules of *Michaelmas* Term, 3 Will. 4, revoked.

And it is hereby further ordered, that, where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.

One at least of the commissioners before whom the acknowledgment is taken, not to be interested, or concerned as attorney, &c.

And it is further ordered, that, before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such


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(a) *Ante*, p. 769.

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one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up such interest; and, where such married woman, in answer to such inquiry, shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but, if it shall appear to them, or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or, if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.



was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his (deponent's) knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit; and that, previously to such acknowledgment being taken, the deponent had inquired of such married woman [*or, if more than one, of each of such married women*] whether she intended to give up her interest in the estate to be passed; and also the answer given thereto; and, where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true: and, where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said Judge [Master, Commissioners.]

And it is hereby further ordered, that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested, shall by deed be described to be situate.

And it is hereby further ordered that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary; or such affidavit may be made, where it is found con-

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Affidavit to state
the parish, &c.
in which the
premises are.

Affidavit to be
in form annexed,
p. 794.

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Certificates to be delivered to the proper officer within one month.

venient, by one of the said commissioners, with such variation in the form thereof as shall be necessary in that behalf.

And it is hereby further ordered, that the certificates, and affidavits verifying the same, shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the Court or a Judge.

Fees.

And it is hereby further ordered that the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—

£ s. d.

To a Judge or Master for taking the acknowledgment of every married woman, of which 7s. 6d. will be paid, in the case of a Judge, to his clerk, and the residue thereof will be

paid over to the treasury; and, in the case of a Master, the whole will be paid over to the treasury or the fee fund account of the Court of Chancery

1 6 8

To the two perpetual commissioners for taking the acknowledg-

	£	s.	d.	1834.
To the same, for every official copy of the certificate.....	0	2	6	REG. GEN.
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of one hundred names	0	5	0	
To the same, for every further complete number of fifty names additional	0	2	6	
To the same, for preparing every special commission, including a fee of five shillings to the clerk of the Chief Justice or other Judge, for the fiat	0	15	0	
To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3rd and 4th Will. 4, c. 74	0	5	0	

And it is hereby further ordered that the fees and charges to be paid for the entries of deeds required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consent of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls, shall be as follows:—

	£	s.	d.
For the indorsements on the deed of the memorandum of production, and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5s., together	0	10	0
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of seventy-two words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders, or the memorandums thereof, on the court rolls, at per folio of seventy-two words	0	0	6

Form of affidavit verifying the certificate of acknowledgment taken in pursuance of the act of parliament, to be made by some practising attorney or solicitor, and to be sworn before a Judge of the Court of *Common Pleas*, or a commissioner appointed for taking affidavits in the said Court.

In the *Common Pleas*.

A. B., of —, in the — of —, gentleman, one of the attornies [*or solicitors*] of the Court of —, maketh oath and saith, that he knows — the wife of — in the certificate hereunto annexed mentioned; and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the Judge [*or Master, or by A. B., of &c., and C. D. of &c., the commissioners in the said certificate mentioned*] on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent; and that at the time of making such acknowledgment the said — was of full age and competent understanding; and that the said — knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made: [(a) And this deponent further saith, that, to the best of this deponent's knowledge and belief, neither of the said commissioners is [*or, the said A. B., or the said D. one of the said commissioners, is not*] in any manner giving occasion for such solicitation

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if more than one, of each of them the said — and — (*the married women*)] whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates; and that, in answer to such inquiry, the said — (*the married woman*) declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest; of which declaration of the said — (*the married woman*) this deponent has no reason to doubt the truth, and verily believes the same to be true [*or*, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates: And this deponent further saith, that, before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed [*or* writing], [*or*, that the terms thereof have been reduced into writing], and that such deed [*or* writing] has been produced to the said Judge [*or* Master, *or* Commissioners:] And lastly this deponent saith that it appears by the deed acknowledged by the said — (*the married woman*) that the premises wherein she is stated to be interested are described to be in the parish [*or* place] of — [*or*, parishes *or* places of — and —], in the county of — [*or*, counties of — and —, *as the case may be.*]

Sworn, &c.

N. B.—When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

E. H. ALDERSON.

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Easter Term,

IN THE FOURTH YEAR OF THE REIGN OF WILL. IV.

BROWN v. Lord GRANVILLE.

Where the attornies of two parties agree to be bound by the judgment of the Court, on demurrer neither party can bring a writ of error to that judgment.

COLERIDGE, Serjt., shewed cause against a rule for issuing execution on the judgment in demurrer in this case, notwithstanding the writ of error brought by the defendant. The facts were these:—An action was brought against the defendant for the amount of certain rates assessed on him, under the *Hanley* and *Shelton* watching and lighting acts, 6 *Geo.* 4, c. lxxiii., and 9 *Geo.* 4, c. xxviii. The question was, whether, as owner or occupier of certain engine houses or sheds in the township or vill of *Shelton*, the defendant was liable to be rated. In order to avoid the delay consequent on stating a special case for the opinion of the Court of *King's Bench*, it was agreed, between the attornies of both parties, that the question should be raised on a demurrer to be argued before this Court, and in the terms of the agreement were these words:—"And that such decision shall bind the

between the parties, into which they entered for the sake of avoiding delay, has virtually precluded them from their right to bring a writ of error. It appears to me, therefore, that the present rule must be made absolute.

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Rule absolute (a).

(a) S. C. 4 M. & Scott, 333.

MAMMATT v. MATHEW.

IN this case, the defendant having been arrested on a *capias*, he applied to Mr. Justice *Parke* to be discharged out of custody, on the ground of a defect in the affidavit of debt. The learned Judge, however, refused to make any order, as he was of opinion that the affidavit was sufficient. The plaintiff's attorney, at the instance of the defendant, consented to accept certain persons as bail, without opposition, it being understood that the defendant acquiesced in the learned Judge's decision. Issue was afterwards joined, and the cause set down in the paper for trial. An application was subsequently made by *Talfourd*, Serjt., to enter an *exoneretur* on the bail-piece. A rule *nisi* having been obtained, on the ground of the before-mentioned alleged defect in the affidavit of debt—

A defendant waives an objection to an affidavit of debt, by inducing the plaintiff to accept of certain persons as bail, by affecting to acquiesce in the decision of a single Judge as to the sufficiency of the affidavit.

Wilde, Serjt., shewed cause, and produced an affidavit, in which it was positively sworn to have been distinctly understood by all parties that they acquiesced in the decision of the learned Judge at chambers.

The Court were unanimously of opinion, that the defendant, by acquiescing in the decision of the learned

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Judge, after the consent of the plaintiff's attorney to accept the proposed bail, had waived the objection.

Rule discharged (a).

(a) S. C. 4 M. & Scott, 356.

MUMMERY v. CAMPBELL.

Where a defendant is discharged out of custody, on the ground of coverture or arrest by a wrong name, the costs of the application are not costs in the cause, and therefore the defendant is not entitled to them if the plaintiff discontinues.

BOMPAS, Serjt., shewed cause against a rule for reviewing the Master's taxation, he having disallowed, on a discontinuance, the costs of an application to discharge the defendant out of custody, on the ground of coverture and misnomer in the *capias*. The learned Serjeant contended, that, as the application was collateral to the proceedings, the costs could not be allowed as costs in the cause.

The Court was of opinion, that, as the sole effect which the application to discharge the defendant could have was to deprive the plaintiff of special bail, it was quite collateral to the action, and therefore the costs of it could not

tion and all matters in difference had been referred to an arbitrator, the costs to abide the event. The declaration contained eight counts. The arbitrator found that the plaintiff had a good cause of action on the third, fourth, fifth, sixth, and seventh counts; that the defendant should pay 5*l.* damages, and that no further proceedings be had. With respect to the first, second, and eighth counts he made no award. On the ground of this omission, the present rule was obtained. The learned Serjeants submitted that the direction of the arbitrator, that no further proceedings should be had in this action, was the same as ordering a *stet processus*, which he had a right to do; that therefore must operate a sufficient award on the first, second, and eighth counts. They cited *Blanchard v. Lilly (a)*.

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Wilde, Serjt., in support of the rule, contended, that, as by the terms of the submission the costs were to abide the event, that must mean such a legal event as would enable the Prothonotary to tax these costs. But, by giving no direction as to three of the counts, he could not tax the costs. The arbitrator, therefore, had by his award contrived to decide on that which was not submitted to him, namely, a portion of the costs of the cause; for, by the omission as to those counts, neither party could get any costs on them.

PARK, J.—The objection here made, it appears to me, is fatal. Unless the costs are in the discretion of the arbitrator, he cannot omit deciding on certain parts of the matters referred to him, so as to prevent the officer from taxing the costs on those parts. That is, however, the effect of the present award. The present rule must, therefore, be made absolute.

(a) 9 East, 497.

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BOSANQUET, J., GASELEE, J., and ALDERSON, J., concurred.

Rule absolute.

SIMS v. JAQUEST.

If a plaintiff arrests a defendant for 27*l.*, and recovers only 10*l.* in consequence of a set-off, the Court will allow the defendant his costs, although the set-off was not quite undisputed,



ANDREWS, Serjt., shewed cause against a rule *nisi* for giving the defendant his costs under the 43 *Geo.* 3, c. 46, on the ground of his having been arrested and held to bail without reasonable or probable cause. The plaintiff had arrested the defendant for 27*l.*, but at the trial only recovered 10*l.* The former sum was reduced by means of a set-off, consisting of a claim for the price of certain chimney-pieces. The defendant, however, did not prove that they were delivered in a fit state to put up, pursuant to his agreement. It was not, however, shewn by the plaintiff that they were *not* in such a fit state. The learned Serjeant cited *Dronefield v. Archer* (a), *Austin v. Debnam* (b).

Talfourd, Serjt., supported the rule.

PARK, J., thought, that, under the circumstances, the plaintiff had clearly no pretence for disputing the amount of the defendant's set-off. The present rule must, therefore, be made absolute.

GASELEE, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule discharged.

(a) 1 Dowl. & Ryl. 67; 5 B. & Ald. 513.

(b) 4 Dowl. & Ryl. 653; 3 B. & C. 139.

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USBORNE v. PENNELL and Another.

BOMPAS, Serjt., shewed cause against a rule *nisi* for setting aside the *capias*, on the ground of a variance from the *præcipe*, and discharging the defendant on entering a common appearance. The writ was indorsed—"Bail by affidavit for 600*l.*;" and the *præcipe* only shewed that the process was a *capias*, without stating that an affidavit of debt had been made, or for what amount. This objection, he contended, was immaterial. The *præcipe* was not process in the cause, but a mere memorandum to serve as instructions to the officer in making out the writ. A variance from it therefore could be no ground for setting aside the *capias*. He cited *Boyd v. Durand* (a).

The omission in the *præcipe* of the sum for which the defendant is to be held to bail is no ground for setting aside a *capias*.

Wilde, Serjt., in support of the rule, contended that the writ being taken away by the attorney, the *præcipe* was the only record left in the office which could inform the defendant for what sum the writ had issued, so as to enable him to be prepared with proper bail.

TINDAL, C. J.—It would appear from the case of *Boyd v. Durand*, as well as the constant practice of the Court, that the *præcipe* is merely instructions to the officer for preparing the writ. A variance therefore such as this is quite immaterial. It is not like the case of a variance between the sum indorsed on the writ and that mentioned in the *præcipe*, which might have misled the party as to the amount of bail required. It does not appear that any instance can be cited in which an application was made to set aside the writ on the ground of the omission; and we can hardly imagine that such an application would not have been made had the practice warranted such a one.

(a) 2 Taunt. 164.

While a rule *nisi* was pending for a new trial in an action for invading the plaintiff's patent, the defendant sued out a *sci. fa.* for the purpose of trying the same right, but the Court would not defer the discussion of the rule until a decision on the *sci. fa.* should be obtained.

WILDE, Serjt., shewed cause for enlarging a rule for a new trial. The case for invading the plaintiff's patent had a verdict. A rule *nisi* for a new trial on behalf of the defendant, and a rule for a *sci. fa.* was deferred for a few days, in order to give counsel. After obtaining the rule for a *sci. fa.* to try the right, but the plaintiff obtained his patent before the present action was brought two years ago. The order of the Court of Chancery was contended, that there was no time within which the rule for a new trial could be discussed, until a decision should be

Stephen, Serjt., in support of the rule, contended that it would be beneficial that the rule should be granted, as the verdict in the present action varied with the verdict in the

action was commenced, and now at last, when a rule for a new trial has been granted, he thinks proper to sue out a *sci. fa.* It appears to me that the mere possibility of our judgment being inconsistent with that on the *sci. fa.* is not a ground for delaying the rights of the parties to this cause.

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PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged.

DUNN v. HARDING.

WILDE, Serjt., shewed cause against a rule *nisi* for cancelling the bail-bond in this case, on the ground that the plaintiff had sued out a second *capias* before the return of one previously issued. The plaintiff had sued out a *capias* into the county of *Middlesex* on the 16th of *November*, and before the return of that writ, on the 7th of *December*, he issued another into the county of *Devon*, without a clause of *alias*. This, it was said, was contrary to the directions of 6 *Reg. Gen. M. T. (a)*, by which it was ordered, "that any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county," &c. But that rule only applied to cases where the previous writ had been returned. That rule made no alteration in the practice with respect to issuing concurrent writs. Previous to that rule, there was no objection to a plaintiff having a number of writs running at the same time in different counties. Were the plaintiff confined to one writ, the defendant might elude him by going into another county.

A plaintiff may issue a second *capias* before the return of one previously sued out.

Talfourd, Serjt., supported the rule.

(a) *Ante*, Vol. 1, p. 471.

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TINDAL, C. J.—The question here is, whether the plaintiff may have concurrent writs at the same time. I think he may. This was the practice before the passing of the late statute, and it has effected no alteration on that point. It would be unreasonable if the plaintiff were not allowed to issue more than one writ at the same time; for, if that were the case, the defendant might escape over the borders of a county, and thus elude the process of the Court. Concurrent writs do not injure the defendant, as he can only be arrested once, and will only be liable to the costs of the writ on which he is arrested. The rule, to which reference has been made, only refers to cases where an *alias* is sued out on the return of the first writ, and not to those where concurrent writs are issued into different counties. I think, therefore, the present rule must be discharged.

PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged.

PRICE v. HARRIS and Others.

Where one of several defendants in an action on the case suffers judgment by default, and the rest obtain a verdict, they are entitled to costs.

WILDE, Serjt., shewed cause against a rule for taxing sixteen of the defendants, who had obtained a verdict, their costs. It was an action on the case against eighteen defendants, for an injury to the plaintiff's reversion.

One defendant suffered judgment by default, and the plaintiff entered a *nolle prosequi* as to the second. The sixteen remaining defendants obtained a verdict, which was entered on the *postea*. The present rule was obtained on the stat. 4 Jac. 1, c. 3; the words of which are, "That if any person or persons, at any time after the end of this present session of Parliament, shall commence

or sue in any Court of record, or in any other Court, any action, bill, or plaint of trespass, or *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or demandant might have costs in case judgment should be given for him, and the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited, or any verdict happen to pass by any lawful trial against the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, then the defendant and defendants in every such action, bill, or plaint shall have judgment to recover costs against every such plaintiff and plaintiffs, demandant and demandants."

The learned Serjeant contended, however, that the case did not come within that statute.

Atcherley, Serjt., contended, that, both within the spirit as well as the letter of the statute, the defendants were entitled to their costs.

TINDAL, C. J.—The question here is, whether a case like the present is within the statute. It provides for two states of circumstances. The first is, where the plaintiff is nonsuited; and the other, where the verdict passes against him. In an action of *tort* it is quite clear, that, although some defendants may have suffered judgment by default, the plaintiff may be nonsuited as to those defendants who have appeared and pleaded not guilty. Now, here, one of the defendants has suffered judgment by default, and others have succeeded by verdict. There can be no reason why they should not be entitled to their costs, as they would have been if the plaintiff had been nonsuited. In the act, the words are, "any verdict happen to pass by any lawful trial against the plaintiff in any such action, then the defendant and defendants shall have judgment to recover costs." Those words must

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mean such defendants as can obtain a verdict against the plaintiff. The defendants here are the only persons in whose favour a verdict can pass. The case of *Day v. Hanks* (a) is directly in point; there the declaration contained two counts, each count containing a different cause of action. The defendant suffered judgment to go by default as to one, and took issue on the other. He obtained a verdict on that issue, and the Court held him to be entitled to his costs on it. The present case, it appears to me, falls within the express language of the statute, as, with respect to these sixteen defendants, a verdict has gone against the plaintiff upon a lawful trial.

PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule absolute.

(a) 3 T. R. 654.

STULTZ v. HENEAGE.

The defendant cannot transfer money deposited in Court in lieu of bail to a payment under a plea of tender.

THIS was an application to transfer a part of a certain sum of money paid into Court in lieu of special bail, to a payment into Court on account of a plea of tender, to the amount of the sum proposed to be transferred. The money in question had been paid into Court pursuant to 7 & 8 Geo. 4, c. 71, s. 2, together with 20*l.* for costs. A rule *nisi* having been obtained for this purpose—

Wilde, Serjt., shewed cause.

Spankie, Serjt., supported the rule.

TINDAL, C. J.—I am of opinion, that we have no

authority to accede to this motion. By s. 2 of the 7 & 8 Geo. 4, c. 71, the sum indorsed upon the writ, with the further sum of 20*l.* for costs, is to remain in Court to abide the event of the suit. By s. 3, the defendant is allowed to take that money out of Court on putting in special bail, and paying such costs to the plaintiff as the Court shall direct. Unless the defendant complies with this provision of the statute, he cannot be permitted to take out this money to be transferred to another purpose.

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PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged.

LYSONS and Wife, Executrix of GARDINER, deceased,
v. BARROW.

SPANKIE, Serjt., shewed cause against a rule *nisi*, for entering up the judgment of nonsuit in this cause without costs. The facts of the case were these:—The testator, *Gardiner*, who was acquainted with the defendant, desired the latter to effect a policy of insurance upon the life of the former on his account. The defendant did so accordingly in his own name. When the testator died, the defendant received the sum insured, as he was the only person whom the office would pay. For the recovery of this sum, an action was brought by the executrix and her husband. The defendant was unwilling to defend the action, but was induced so to do at the instance of persons claiming interest in the proceeds of the insurance. At the trial, the plaintiffs were nonsuited, on the ground that *Gardiner* had no legal interest in the policy. The question was, whether, under 3 & 4 Will. 4, c. 42, s. 31, the defendant was entitled to his costs as against the plain-

If there is reasonable or probable cause for bringing an action as executor or administrator, and the plaintiff is nonsuited, he will not be liable to costs, notwithstanding the 3 & 4 Will. 4, c. 42, s. 31.

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tiffs, they suing in their representative character. The words of that section are, "That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the Court in which such action is brought, or a Judge of any of the superior Courts of law at Westminster, shall otherwise order*, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner." The learned Serjeant contended, that as the right of action, if any, had accrued by the payment of the money from the insurance office after the testator's death, the plaintiff would, previous to the passing of the late act, have been liable to pay costs. The Court could not now deprive the defendant of his right. He cited *Dowbiggin v. Harrison* (a), and *Jobson v. Forster* (b).

Wilde, Serjt., in support of the rule, contended that as the defendant admitted the receipt of the money, and as, since the policy was effected for the benefit of the testator, the plaintiffs could only sue in their representative character, they ought not to be liable to costs. He cited *Tattersall v. Grote* (c), where the Court held, that, "if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate."

Cur. adv. vult.

PARK, J.—This case will depend almost entirely on the

(a) 4 Man. & Ryl. 622; 9 B. & C. 666.

(b) 1 B. & Adol. 6.

(c) 2 B. & P. 255.

construction we put on the 3 & 4 Will. 4, c. 42, s. 31. The plaintiffs could have sued in no other way than in the characters of executors; for, except in that character, they had no *locus standi* any more than the most indifferent person. They would not, therefore, under the old law have been liable to pay costs; but, by the operation of the new statute, they would be liable to pay them, without the interposition of the Court. We are, however, of opinion that the plaintiffs ought not to pay costs. One principal consideration is, whether this was a frivolous action? It appears, however, from the facts of the case, that the plaintiffs were bound, from duty to the estate, to bring the action. No interest in the matter was claimed by the defendant, and he frequently stated that he would not defend the action. At the trial, too, they were defeated on a point which they could not be supposed to apprehend. From the nature of the case the promise could only be after the death of the testator. But, if the plaintiffs had obtained a verdict, the proceeds would have been assets in their hands. Although, therefore, according to the general language of the statute, they would be liable to costs, yet, if the Court thinks proper to make exceptions to the generality of the enactment, they may do so, where there is reasonable or probable cause for bringing the action as executors or administrators. If this were not the case, the clause would not have been introduced containing these important words, "unless the Court in which such action is brought, or a Judge of any of the superior Courts, shall otherwise order." I am, therefore, of opinion, that the present rule must be made absolute.

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GASELEE, J., and VAUGHAN, J., concurred.

Rule absolute.

on the 18th April; costs were taxed on the 21st, final judgment signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the first day of the term. The Court refused to set aside the *fi. fa.* for the irregularity.

on the 22nd, and a *fi. fa.* issued on the 15th, and returnable on the

Goulburn, Serjt., on a former to set aside the *fi. fa.* for irregularity, having issued after the death of a previous *sci. fa.* He referred to *T. 4 Will. 4*, (Pleading Rules) judgments, whether interlocutory or of record of the day of the month or vacation, when signed, to any other day."

Wilde, Serjt., shewed cause. By the judgment it is regular. *c. 39, s. 12*, merely directs that the authority of that act shall bear the same shall be issued: and for the commencement of actions. In *Sutton v. Lord Cardross* (c), *ca. sa.* is issued in the course of the name of a Chief Justice who was the writ, but alive on the first day. The court will not inquire into the exact date, but will consider it regular, as on

teste on the day of issuing thereof." But that provision, as well as that in the 3 & 4 Will. 4, c. 67, s. 2, applies only to writs issued under the authority of those acts, and to judgments signed in vacation. They are not intended to operate in restraint of the suitor, but as affording an indulgence. They affect no alteration in the previous practice as to writs of execution. A *sci. fa.* is never issued, unless the *fi. fa.* appears on the face of it to be tested subsequently to the death of the party. *Waghorne v. Langmead* (a).

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Goulburn, Serjt., in support of his rule.—It is competent to the defendant to shew that the judgment upon which the *fi. fa.* has issued is irregular; and, therefore, that the *fi. fa.* is likewise erroneous. The judgment is in direct contravention of the rule of *Hilary* Term; and consequently the *fi. fa.* cannot be supported.

TINDAL, C. J.—The plaintiff is brought here to defend the *fi. fa.*, which on the face of it is regular. The objection should have been to the judgment.

The rest of the Court concurring—

Rule discharged.

(a) 1 Bos. & Pull. 571.

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DICAS, Gent., one &c., v. WARNE.

A rule for striking an attorney off the roll for misconduct being referred to the Prothonotary, he may receive any evidence tending to elucidate the matter.

IN *Michaelmas* Term last, a rule *nisi* was obtained by *Wilde*, Serjt., to strike the defendant's attorney off the roll, for having hired or caused to be hired sham bail in error. In the following term, *Jones*, Serjt., shewed cause, when the matter was referred for investigation before one of the Prothonotaries. The parties attended before the Prothonotary, who reported that the attorney had answered all the charges brought against him.

Wilde, Serjt., moved that the matter might be referred back to the Prothonotary, with directions to him to take into his consideration certain additional affidavits that had been tendered to and rejected by him, on the ground that they were not before the Court when the matter was referred.

PARK, J.—The Prothonotary must go into the investigation again. All affidavits tending to explain the matter should be received.

GASELEE, J.—The object of sending the case to the Prothonotary was, that it might receive a fuller discussion than in open Court. The officer may receive any thing that tends to elucidate and further the inquiry.

Referred back to the Prothonotary.

On a reference to the Prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired:—The Court discharged the rule on payment of costs by the attorney.

ON a subsequent day the Prothonotary made his further report, stating that he was of opinion, that, although it did not appear that the attorney did himself actually hire or cause to be hired the bail in question, enough appeared to shew that he must have been aware that the bail put in were hired bail.

—The Court discharged the rule on payment of costs by the attorney.

TINDAL, C. J.—The report of the officer affixes on the attorney a certain degree of criminality, though of a lighter character than that originally charged. It seems to us that the justice of the case will be answered by making the attorney pay all the costs of and occasioned by these proceedings.

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Rule discharged accordingly.

KIRBY v. SIGGERS.

A WRIT of summons had issued out of this Court by the plaintiff against the defendant, but not served. A second writ afterwards issued out of the Court of *Exchequer* between the same parties, for the same cause. The defendant pleaded, to the action in the *Exchequer*, another action pending in this Court for the same cause. The plaintiff replied *nul tiel* record, and served the defendant with a rule to produce. The first writ never having been filed, there was no record in existence, and therefore the defendant, by the advice (as he swore) of one of the officers of the Court, made up a roll from the *præcipe*.

Wilde, Serjt., on a former day, obtained a rule *nisi* that the roll might be cancelled, with costs.

Stephen, Serjt., shewed cause.—He contended that the course the defendant had adopted was the only one that was open to him, and cited *Whitmore v. Rook (a)*.

Wilde, Serjt., in support of his rule.—The defendant might have obtained time to plead to the declaration in the *Exchequer*, so as to enable him to apply to this Court

The plaintiff issued two writs, one out of this Court, the other out of the *Exchequer*. The first was never served; on the second the plaintiff declared. The defendant pleaded, to the second action, another action pending for the same cause in this Court. The plaintiff replied *nul tiel* record, and served the defendant with a rule to produce. The defendant made up a roll from the *præcipe* on the file of this Court:—The Court directed it to be cancelled, with costs.

(a) 1 Lord Ken. 345.

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 {
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to cause the writ here to be filed; if the circumstances would warrant such a course. The plaintiff had a right to abandon the first writ, it not having been served, nor any appearance entered to it.

TINDAL, C. J.—The defendant's attorney has been guilty of a great irregularity. A defendant has no right in any case to enter on record any of the plaintiff's proceedings. In this case the defendant might have applied to the Court, and he would have obtained redress if he were aggrieved by the conduct of the plaintiff.

The rest of the Court concurring—

Rule absolute, with costs.

MEMORANDUM.

ON the 25th of *April*, the following Warrant was read in Court, and entered of record:—

WILLIAM, R.

WHEREAS it hath been represented to Us, that it would tend to the general dispatch of the business now pending in Our several Courts of Common Law at *Westminster*, if the right of Counsel to practise, plead, and to be heard extended equally to all the said Courts; but such object cannot be effected so long as the Serjeants at law have the exclusive privilege of practising, pleading, and audience, during term time, in our Courts of *Common Pleas* at *Westminster*: We do therefore hereby order and direct, that the right of practising, pleading, and audience, in Our said Court of *Common Pleas* during term time, shall, upon and from the first day of *Trinity* Term now next ensuing, cease to be exercised exclusively by the Serjeants at law; and that upon and from that day, Our Counsel learned in

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the law, and all other Barristers at law, shall and may, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the said Court of *Common Pleas* at *Westminster* with the Serjeants at law. And We do hereby will and require you to signify to Sir *Nicolas Conyngham Tindal*, Knight, Our Chief Justice, and his companions, Justices of Our said Court of *Common Pleas*, this Our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this Our purpose into effect. And whereas We are graciously pleased, as a mark of Our royal favour, to confer upon the Serjeants at law hereinafter named, being Serjeants at this present time in actual practice in Our said Court of *Common Pleas*, some permanent place in all Our Courts of Law and Equity, We do hereby further order and direct that *Vitruvius Lawes*, *Thomas D'Oyley*, *Thomas Peake*, *William St. Julian Arabin*, *John Adams*, *Thomas Andrews*, *Henry Storks*, *Ebenzer Ludlow*, *John Scriven*, *Henry John Stephen*, *Charles Carpenter Bompas*, *Edward Goulburn*, *George Heath*, *John Taylor Coleridge*, and *Thomas Noon Talfourd*, Serjeants at law, shall henceforth, according to their respective seniority amongst themselves, have rank, place, and audience, in all Our Courts of Law and Equity, next after *John Balguy*, Esq., one of Our Counsel learned in the law: And We do hereby will and require you not only to cause this Our direction to be observed in Our Court of *Chancery*, but also to signify to the Judges of Our several other Courts at *Westminster*, that it is Our express pleasure that the same course be observed in all Our said Courts. Given at Our Court of *St. James's* this 24th day of *April*, in the Fourth year of our reign.

To the Right Honourable

Henry Lord Brougham and Vaux,

Lord Chancellor of Great Britain.

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Trinity Term

IN THE FOURTH YEAR OF THE

COCKMAN v. HEL

Since the rule of *Hilary, 4 Will. 4*, s. 1, reg. 3, it is not necessary that the affidavit, on which the motion to enter up judgment on an old warrant of attorney is made, should state that the defendant was alive on a day in term.

BUTT moved for leave to enter warrant of attorney, upon an affidavit that the defendant was alive on the 21st instant, the defendant submitted that the reason for the affidavit to state the party to be *viz.* that the judgment had relation to term, no longer existed, since that by the rule of *Hilary, 4 Will. 4*, directs "that all judgments, whether shall be entered of record of the year, *whether in term or vacation*, not have relation to any other day (

(a) *Ante*, p. 313

ROBERTS v. WEDDERBURN

The defendant was detained on a *pluries capias* having a blank left for his place of residence, after a *capias* and *alias* describing him as of C. Street.—The Court set aside the writ and proceedings.

THE defendant had been detained wherein there was a blank left for 1 after a *capias* and an *alias capias* having him as of Chesterfield Street, N of Middlesex. *Bosanquet, J.*, at C the writ and proceedings should be *quashed*, on the ground that the writ was in the form in the schedule to the 2^d Act requiring the residence of the defendant in the process.

Wilde, Serjt., obtained a rule *nisi* to set aside that order, upon an affidavit stating, that, since the issuing of the *capias* and *alias capias*, and before the issuing of the *pluries*, the defendant had gone abroad, and had to the knowledge of the plaintiff no place of residence in this country.

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Merewether, Serjt., shewed cause.—The 1st section of the 2 *Will.* 4, c. 39, provides that in all cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament, &c., the process shall be according to the form contained in the schedule, marked No. 1, and that, in every such writ, and copy thereof, the place and county of the residence or *supposed residence* of the party defendant, or wherein the defendant shall be, or *shall be supposed to be*, shall be mentioned: and by the 4th section, it is provided, that, in all such actions wherein it shall be intended to arrest and hold any person to special bail, the process shall be by writ of *capias according to the form contained in the said schedule* and marked No. 4; and in that form a blank is left for the insertion of the place of residence of the defendant. In the present case, there could be no excuse for omitting to state the defendant's residence, the previous process having described him.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the Court:—

In this case the defendant has been detained upon a *pluries* writ of *capias*, wherein there is a blank left for his place of residence, after a *capias* and *alias* had been issued describing the defendant as of Chesterfield St., May Fair, in the county of Middlesex. The question which has been argued before us has been whether the present writ is irregular and ought to be set aside; and it is the opin-

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ion of a majority of the Judges that such is the case. The act for uniformity of process enacts, by section 4, that, where it is intended to arrest the defendant, the process shall be by writ of *capias* according to the form No. 4, contained in the schedule; and, upon reference to that form, it is clearly intended that the residence of the party shall be described both in the writ of *capias* and in those writs which purport to be a continuance of it. In what manner and to what degree of strictness this description is necessary will appear by section 1; for, although the enactment in that section relates to writs of summons only, it shews by analogy what was the intention of the legislature in this respect, viz. "the place or county of the residence or supposed residence of the defendant, or wherein the defendant shall be or shall be supposed to be;" so that it is difficult to conceive any case in which the plaintiff can be at a loss to comply with one of these requisites: at all events that difficulty does not apply to the present case, where the two preceding writs (of which this is the continuance) had given him a description. Upon the ground that it is much better for the public to adhere in all practicable cases to the strict, close, literal compliance with the forms prescribed by the act, rather than to yield to particular cases of supposed hardship on individuals, where the requisites have not been formally complied with, we think the rule for setting aside Mr. Justice *Bosanquet's* order must be discharged; and that this writ and the subsequent proceedings must be set aside for irregularity.

Rule absolute (a).

(a) See *Welsh v. Langford*, ante, p. 498, and *Buffle v. Jackson*, ante, p. 505.

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WILLIAMS, Demandant, HARRIS, Tenant.

THE demandant in a writ of intrusion having entered a *nolle prosequi*—

The tenant in a writ of intrusion is not entitled to costs where the demandant enters a *nolle prosequi*.

Merewether, Serjt., obtained a rule *nisi* that the tenant's costs might be taxed under the 8 *Eliz.* c. 2, s. 2. He cited *Cooper v. Tiffin* (a) to shew that a *nolle prosequi* is within the act.

Stephen, Serjt., now shewed cause.—This being a real action, and by the statute of *Gloucester*, 6 *Ed.* 1, c. 1, costs being recoverable only in those cases where damages are given, no costs can be taxed. *Newman v. Goodman* (b). *Pilford's case* (c). *Cooper v. Tiffin* was decided on the 23 *Hen.* 8, c. 15, which relates only to personal actions: and so, the title and preamble of the 8 *Eliz.* c. 2, shew that that statute also relates only to actions personal.

Merewether, Serjt., in support of his rule.—The Courts have on various occasions extended the operation of the statute of *Elizabeth* to actions that are not within the words of it: and this case is clearly within the mischief pointed out by the preamble.

Lord Chief Justice TINDAL.—The question is, whether in a real action, the demandant having entered a *nolle prosequi*, the tenant is entitled to costs. In general in real actions the tenant is not entitled to costs, the demandant not being entitled, except in certain cases when costs are given by statute. Before the 23 *Hen.* 8, c. 15, a defendant was in no case entitled to costs. That statute only

(a) 3 Term Rep. 511.

(b) 2 Sir W. Blac. 1098.

(c) 10 Rep. 116. a.

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Demandant,
HARRIS,
Tenant.

applies to personal actions. But it is said that the 8 *Eliz.* c. 2, having been held to embrace the case of a *nolle prosequi*, which is not strictly warranted by the words of the act, also includes within its equity a case like the present. It seems to me, however, not be so. I think the defendant is only entitled to costs in those cases where the plaintiff if he succeed can be entitled: and, as it is perfectly clear that the defendant can have no costs in this form of action, I think the tenant is not entitled.

Mr. Justice PARK.—The statute of *Elizabeth* has been carried much further than, if it now came before us for the first time, I for one should feel inclined to carry it.

GASELEE, J., and VAUGHAN, J., concurred.

EICKE v. NOKES.

The 59th sect. of the 6 *Geo.* 4, c. 16, which operates a stay of proceedings in an action commenced against the bankrupt before the issuing of the commission, where the plaintiff elects to prove the debt, does not apply to the case of a fiat sued out by the plaintiff himself.

THE plaintiff having been nonsuited in an action on certain bills of costs for business done by the plaintiff as attorney for the defendant, obtained a rule for a new trial, which was subsequently discharged.

Curwood now moved to stay proceedings, on an affidavit stating, that, two days before the motion was made for a new trial, the plaintiff had obtained a fiat in bankruptcy against the defendant. This he submitted operated as a stay of the proceedings, the 59th section of the 6 *Geo.* 4, c. 16, enacting “that no creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and

in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as assignee without giving a sufficient authority in writing for the discharge of such bankrupt; and that the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed; provided that such creditor shall not be liable to the payment to such bankrupt or his assigness of the costs of such action or suit so relinquished by him."

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TINDAL, C. J.—All that that section directs is, that a creditor who has commenced an action against one against whom a commission afterwards issues, and proves under the commission, shall be deemed to have made an election to take the benefit of such commission, and shall not be liable to costs in respect of the suit so relinquished by him. That clause evidently points at a commission sued out by a third person, and does not apply to a case like the present, where the fiat has been obtained by the plaintiff in the action himself.

The rest of the Court concurring—

Rule refused.

PEPPER v. WHALLEY.

WILDE, Serjt., in the last term obtained a rule *nisi* to set aside the proceedings in this cause for irregularity. The irregularity was, that the process contained the names

The names of two defendants were inserted in the process, and, after appearance by the defendants, the plain-

tiff declared against them separately :—The Court set aside the declaration for irregularity.

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 v.
 WHALLEY.

of two defendants, against whom declarations in separate actions had since been delivered. He referred to the rule of *Michaelmas* Term, 3 *Will.* 4, reg. (a), which directs that "every writ of summons, *capias*, and detainer shall contain the names of all the defendants, if more than one in the action, and shall not contain the name or names of any defendant or defendants in more actions than one."

Talfourd, Serjt., *contra*, submitted that the defendants had waived the irregularity, if any, by appearing.

Wilde, Serjt., in support of the rule.—The irregularity, occurring subsequently to the appearance, could not be waived by it.

Per Curiam.—The objection cannot be got over, the words of the rule are clear.

Rule absolute.

(a) *Ante*, Vol. 1. p. 470.

DOE d. GLYNN v. ROE.

In this Court, the motion for judgment against the casual ejector must be made in conformity with the rule of *Michaelmas* Term, 32 *Car.* 2.

EJECTMENT for a breach of a covenant to repair. On the *sixth* day of this term—

E. V. Williams obtained a rule *nisi* for judgment against the casual ejector.

Watson now shewed cause.—The motion was not in time. The rule of *Trinity* Term, 32 *Car.* 2, requires motions of this sort, in this Court, to be made within the first four days of *Hilary* and *Trinity* Terms, and within one week of the 1st day of *Michaelmas* and *Easter* Terms. No reason is here assigned for the delay: and our affidavits shew that this is a case of considerable hardship and

vexation, and that another ejectment has been brought in the King's Bench to recover the same premises.

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Williams, in support of the rule, submitted that the Court would be justified in departing from the strict letter of the rule in question, which had evidently been overlooked when the late rules assimilating the practice of the several Courts were framed—particularly as the fact of the practice being so assimilated in every other particular had given rise to the error.

TINDAL, C. J.—This is certainly not a case to favour which we should feel inclined to break in upon a rule of the Court, which, though apparently overlooked in the late changes, is still not obsolete. I think the rule must be discharged, but, under the circumstances, without costs.

The rest of the Court concurring—

Rule discharged, without costs.

MEEKIN v. WHALLEY.

THE defendant paid the debt after process had been served upon him. The plaintiff's attorney proceeded for costs. It appeared that the gentleman in question had formerly been duly admitted and inrolled as an attorney in the King's Bench, and had also been admitted in this Court, but not inrolled; that he afterwards omitted to take out his certificate, and therefore ceased to be an attorney; and that he was re-admitted in the Court of King's Bench in the beginning of the year 1833, but not in this Court, and, on the 15th January, 1833, took out a certificate for that year. The writ was sued out on the

Defendant having paid the debt, plaintiff's attorney proceeded for costs. The attorney being uncertificated, and therefore not entitled to sue for costs, the Court stayed the execution.

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6th of December, and the attorney's certificate for the year commencing on the 1st November, 1833, was not taken out until March, 1834.

A verdict having been found for the plaintiff with nominal damages, and final judgment having been signed and execution issued for the costs—

Wilde, Serjt., obtained a rule *nisi* to suspend the execution. He cited *Paterson v. Powell* (a).

Talfourd, Serjt., now shewed cause.—The motion is too late, it not having been made until final judgment signed, costs taxed, and execution issued. Besides, it appears from the defendant's affidavit that he was aware of the objection at the commencement of the suit. In *Paterson v. Powell* nothing was said by the Court; the whole passed by consent. But in *Reader v. Bloom* (b), it was held that a plaintiff, who has obtained a verdict against a defendant, is entitled to his full costs, although the person who conducted his cause was not an attorney. Inrolment is not essential; the admission is complete without it. A certificate is *prima facie* evidence of the legal right of an attorney to practise. *Pearse v. Whale* (c).

Wilde, Serjt., in support of his rule.—By the 2 *Geo.* 2, c. 23, s. 5, it is enacted, that no person shall be permitted to act as an attorney, or to sue out any writ or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before or after judgment obtained, in the name or names of any other person or persons, in his Majesty's Court of King's Bench, Common Pleas, or Exchequer, &c., unless such person shall be examined, sworn, admitted, and *inrolled* in manner

(a) 3 M. & Scott, 195; *ante*, p. 738, S. C.

(c) 7 Dow. & Ryl. 512, 6 Barn. & Cress. 38.

(b) 10 J. B. Moore, 261.

therein mentioned: and by section 24, it is provided, that, "in case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceeding in any of the Courts of law aforesaid, &c., as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted and *inrolled* as aforesaid, every such person, for every such offence, shall forfeit and pay 50*l.* to the use of the person who shall prosecute him for the said offence, and is thereby made incapable to maintain or prosecute any action or suit in any Court of law or equity, for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding." And by the 37 Geo. 3, c. 90, s. 31, it is provided that every person admitted, sworn, *inrolled*, or registered in any of the said Courts as aforesaid, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name or in the name of any other person in any of the said Courts, by virtue of such admission, entry, inrolment, or register; and the admission, entry, inrolment, or register of such person in any of the said Courts shall be from thenceforth null and void. *Reader v. Bloom* proceeded on the assumption of a fact which is not generally correct, and certainly does not exist in the present case, viz. that suitors usually pay money in advance to their attornies. The doctrine of that case seems to have been doubted, and its authority shaken, by *Young v. Dowlman* (a). There, the plaintiff had discontinued, and, on the taxation of costs, it was objected on the part of the plaintiff that the person acting as attorney for the defendant was not an attorney of the Court. No advances of money having been made by the

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(a) 3 Younge & Jervis, 24.

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defendant, the Master refused to allow the costs; but the Court held that the defendant was not entitled. In *Paterson v. Powell*, the defendant was held to be entitled to costs only to the extent of the actual advances made by him to his attorney on account of the suit.

TINDAL, C. J.—I think we may determine this case without touching the authority of *Reader v. Bloom*. There, the action proceeded in the ordinary course: here, it proceeded solely for the benefit of plaintiff's attorney, the debt having been paid. I think this is a case in which we shall be well warranted in withholding costs from the plaintiff, seeing that he never could be liable to his attorney for them.

PARK, J.—Having been one of the Judges concurring in the decision of *Reader v. Bloom*, I should be unwilling to overturn it. For the reasons assigned by my Lord Chief Justice, I think this case is distinguishable.

GASELEE, J.—*Reader v. Bloom* proceeded upon the idea of something having been paid by the client to the supposed attorney on account of the suit. Here no such fact appears: the plaintiff was not interested in the action.

BOSANQUET, J.—It is enough to say that this case is materially different from *Reader v. Bloom*, in the circumstance that here the suit proceeded solely for the benefit of the attorney.

Rule absolute.

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HUMPHRYS v. HARVEY.

WILDE, Serjt., on a former day, obtained a rule calling upon the defendant to shew cause why all further proceedings upon the judgment of nonsuit in this cause should not be stayed, *without costs*, on the ground that the attorney by whom the defence was conducted, had not been duly inrolled. The affidavit upon which the motion was founded stated that a very small sum, if any thing, had been advanced by the defendant to his attorney on account of the costs in the cause.

It is not competent to an attorney who has not been *inrolled* to sue for any fees or disbursements: where, therefore, the defendant's attorney (duly qualified in other respects to act as an attorney) had omitted to cause himself to be inrolled, and the defendant had made no advance on account of the suit—The Court allowed the plaintiff to discontinue without costs.

Robinson shewed cause.—This is an application, not against the attorney who has been guilty of the supposed irregularity, as will be found to have been the case wherever this question has hitherto come before the Courts, but against the party. In *Reader v. Bloom* (a) this Court decided that a party who has obtained a verdict is entitled to his full costs, although the person who conducted his cause was not an attorney. [*Bosanquet*, J., referred to *Latham v. Hyde* (b), and *Young v. Dowlman* (c).] In — v. *Sexton* (d), Mr. Justice *J. Parke* recognised and acted upon the case of *Reader v. Bloom*. The attorney has substantially complied with all that the acts of parliament require. The 5th section of the 34 Geo. 3, c. 14, enacts “that any person who shall be *admitted* to be a solicitor or attorney in any of his Majesty's Courts at *Westminster*, by virtue, &c., may be *admitted* to be a solicitor or attorney in all or any of the Courts in that act mentioned, without payment of any further stamp-duty in pursuance of that act; subject nevertheless to all and every the provisions prescribed by

(a) 10 J. B. Moore, 261; 3 1 Dowl. P. C. 594.

Bing. 9.

(c) 3 Younge & Jervis, 24.

(b) 1 Crompton & Meeson, 128;

(d) 1 Dowl. P. C. 180.

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law with relation to the *admission* of solicitors and attornies in such Courts respectively before the passing of that act." As far as regards the admission, all has been done in the present case that the act requires: the only question is whether *inrolment* be also necessary; and, if so, whether the attorney has not been duly inrolled. The 2 *Geo. 2*, c. 23, s. 1, enacts that no person shall be permitted to act as an attorney, or to sue out any process, or to commence, carry on, or defend any action or actions, or any other proceedings, either before or after judgment obtained, in the name or names of any person or persons, in his Majesty's Courts of *King's Bench*, &c., unless such person shall be sworn, admitted, and inrolled in the said respective Courts in such manner as is thereafter directed. And the 2nd section enacts "that the Judges of the said Courts respectively, or any one or more of them, shall, and they are thereby authorized and required, before they shall admit such person to take the said oath, to examine and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and, if such Judge or Judges respectively shall be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively shall, and they are thereby authorized to administer to such person the oath thereafter directed to be taken by attornies, and, after such oath taken, to cause him to be admitted an attorney of such Court respectively, and his name to be inrolled as an attorney of such Court respectively, without any fee or reward other than one shilling for administering such oath; which admission shall be written on parchment in the *English* tongue, in a common legible hand, and signed by such Judge or Judges respectively, whereon the lawful stamp shall be first impressed, and shall be delivered to such person so admitted." The reasonable construction of these enactments is, that *inrolment* is not necessary to

enable a party to practise as an attorney: the second section would seem to make the inrolment the act of the Judge, or the Court. Besides, it appears from the affidavit that the defendant's attorney did actually sign the roll of the Court upon his being sworn (a).

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Wilde, Serjt., in support of his rule.—It is important that the public should have the means of ascertaining who are qualified to act as attorneys of the Courts; the inrolment is the only means by which this object can be effected. With this view, the acts of parliament relating to attorneys expressly require inrolment as well as admission. The 5th section of the 34 Geo. 3, c. 14, is the only enactment in which the inrolment is not actually mentioned; but it expressly relates back to the statute of the 2 Geo. 2, c. 23, all the provisions of which shew inrolment to be necessary. By the 4th section of the 34 Geo. 3, c. 14, it is enacted, that, in case any person shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any of the Courts at *Westminster* as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted *and inrolled* an attorney or solicitor in one of the said Courts at *Westminster*, according to the directions of the several acts in force for the regulation of attorneys and solicitors, every such person shall, for every such offence, forfeit the sum of 100*l.*; and such person is thereby also made incapable to maintain or prosecute any action or suit in any Court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. In the present case it is admitted that the person by whom the defence has been conducted has not been inrolled, and therefore has not put

(a) For the practice upon the subject of inrolment, see *Tidd's Practice*, 9th edit. p. 71.

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himself in a situation to practise as an attorney of the Court. The affidavit upon which this motion was made shews that the defendant's attorney comes to recover costs for his own benefit; for, it is suggested, and scarcely denied, that the defendant has absconded; and it is not alleged on the part of the defendant that any advances have been made by him in the course of the cause. The assumption of this latter fact was the ground upon which this Court proceeded in the case of *Reader v. Bloom*, and the limit to which that decision was confined by the Court of *Exchequer* in *Young v. Dowlman*, and by this Court in the subsequent case of *Paterson v. Powell (a)*. The case of — *v. Sexton* is totally inapplicable: it appears that in that case the party had changed his attorney twice in the course of the suit, which could only have been on payment of costs.

TINDAL, C. J.—The simple question here is, whether, where an attorney has not been duly admitted *and inrolled* as an attorney of the Court, we can lend our aid to enable him indirectly to recover his costs, when he cannot do so directly. The principal case relied on on the part of the defendant is that of *Reader v. Bloom*. That case proceeded upon the assumption that money is usually advanced by the client in the progress of the cause. Undoubtedly, *Young v. Dowlman* has considerably weakened the authority of *Reader v. Bloom*. Is the inrolment a condition precedent to the attorney's right to recover costs? It has been contended on the part of the defendant, that inrolment is not necessary to enable the attorney to practise as such; and that on the authority of the 34 Geo. 3, c. 14, s. 5, which enacts that any person who shall be *admitted* to be a solicitor or attorney in any of his Majesty's Courts at *Westminster*, by virtue &c., may be

(a) 3 M. & Scott, 195; and *ante*, p. 738.

admitted to be a solicitor or attorney in all or any of the Courts in the act mentioned, without payment of any further stamp-duty in pursuance of that act. It is true that section only speaks of admission, and omits all mention of inrolment: but the following proviso or condition is subjoined—"subject nevertheless to all and every the provisions prescribed by law with relation to the admission of solicitors and attornies in such Courts respectively before the passing of that act." This refers us back to the prior statutes regulating the admission of attornies and solicitors, which make the inrolment imperative; and we cannot construe the later statute, which is merely an act passed for revenue purposes, as operating a repeal of the former ones. The 1st and 2nd sections of the 2 Geo. 2, c. 23, are clear and unambiguous: the former section enacts that no person shall be permitted to act as an attorney, or to sue out any process, or to commence, carry on, or defend any action or actions, or any other proceedings either before or after judgment obtained, in the name or names of any person or persons, in his Majesty's Courts of *King's Bench*, &c., unless such person shall be sworn, admitted, and inrolled in the said respective Courts in such manner as is thereafter directed; and by the latter section the Judges of the said Courts respectively are authorized and directed to administer to such person the oath in that act directed to be taken by attornies, and, after such oath taken, to cause him to be admitted an attorney of such Court, and *his name to be inrolled as an attorney of such Court*. The 18th section prescribes the person by whom and the manner in which the inrolment shall be made. And the 24th section enacts, that, in case any person shall, in his own name, or in the name of any other person, sue out any writ or process, &c., &c., as an attorney or solicitor, without being admitted and *inrolled*, every such person shall forfeit and pay 50*l.* and be incapable to maintain or prosecute any action or suit in any Court of law or

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equity for any fee, &c. I am of opinion, that, when the fact of the defendant's attorney having omitted to cause himself to be inrolled is brought before the Court, and the client is not prejudiced, we ought not to lend our aid to enable the defendant to recover costs from the plaintiff, inasmuch as his attorney is not in a condition to sue him.

The rest of the Court concurring,

Rule absolute.

ROWLAND v. DAKEYNE and Others.

In an action on a bail-bond, or a replevin-bond, it is not necessary to indorse the amount of debt and costs pursuant to 2 Reg. Gen. Hilary Term, 2 Will. 4, & 5 Reg. Gen., Michaelmas Term, 3 Will. 4.

THIS was an action upon a bail-bond. A summons had been obtained to set aside the proceedings, on the ground that the debt and costs had not been indorsed upon the process pursuant to the rule of 2 Reg. Gen. Hilary Term, 2 Will. 4, and 5 Reg. Gen. Michaelmas Term, 3 Will. 4. It was heard before Mr. Justice Alderson at chambers.

On the part of the defendant, it was argued, that wherever any sum appeared to be due, that sum ought to be indorsed, and consequently that the penalty ought to have been indorsed in this case.

On the part of the plaintiff, it was contended, that, as the action was for breach of the condition of a bond, that condition being to put in and perfect special bail, the action could not properly be considered "for the payment of any debt." If the intention of the rule was to inform the defendant of the amount of debt and costs, which he was required to pay, in order to prevent additional expense, the penalty was the only sum of money which appeared upon the bond; and the indorsement of the penalty as the amount of debt and costs claimed could not meet the intention of the rule, as such indorsement would demand

much more than the Court under the 4 & 5 *Anne*, c. 15, s. 20, would allow to be recovered.

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ALDERSON, J., postponed his decision, and, after consulting the other Judges of the *Common Pleas*, and also those of the *King's Bench* and *Exchequer*, he dismissed the summons, and made the following indorsement upon it "No Order." A majority of the Judges held, that, under the circumstances, the indorsement was properly omitted.

Summons dismissed (a).

(a) This decision having been cited to the full Court, in answer to an application to set aside proceedings on the same ground in an action on a replevin-bond, the Court discharged the rule.

REGULÆ GENERALES.

IT IS ORDERED, that, from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late act of Parliament respecting fines and recoveries, as state 'the deponent's knowledge of the party making the acknowledgment, and her being of full age,' cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person whom the person before whom the affidavit shall be made shall consider competent so to do.

Supplemental
 rule of the Court
 of *Common Pleas*
 relating to ac-
 knowledgment.

And IT IS FURTHER ORDERED, that, where more than one married woman shall at the same time acknowledge the same deed respecting the same property, the fees directed

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by the said rules to be taken sh
acknowledgment only; and the
other acknowledgment or ackno
soever the same may be, shall be
fees; and so also where the same
the same time acknowledge more t
the same property.

And where, in either of the ab
more than one acknowledgment, a
may be included in one certificate

In every case the acknowledgm
shall be considered and paid for
only.

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Where a defendant applies to put off a trial, on account of the absence of a material witness, but does not give notice to the other side till expense has been incurred in bringing up witnesses, the application will only be granted on payment of the expense of the witnesses. It is not necessary that the affidavit in support of such an application should swear to a good defence on the merits; it is sufficient if the witness is sworn to be material and necessary. *Attorney-General v. Hull*, 111

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ACCOUNT STATED.

1. An acknowledgment by a defendant, after action brought, of money being due to the plaintiff, when there

is no debt or account between them proved to have existed before action brought, is not evidence on an account stated. *Allen v. Cook*, 546

2. The assignees of an insolvent tenant, in consideration of being allowed to recover certain fixtures, agreed to pay to the landlord 7*l.* for the last quarter's rent:—*Held*, that the sum could not be recovered on the count upon an account stated, there having been no use and occupation by the defendants; and that the agreement should have been declared on specially. *Clarke v. Webb*, 671

3. In an action on an account stated, the defendant cannot *now*, under the plea of *non assumpsit*, give in evidence a subsequent account alleged to be in his favour. *Fidgett v. Penny*, 714

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exchange not stating the amount for which the bill was drawn:—*Held*, bad. *Brook v. Coleman*, 7

2. An affidavit of debt for the price of goods guaranteed by the defendant, without shewing on what terms, or that the time for payment has expired:—*Held*, bad. *Angus v. Robilliard*, 90

3. An affidavit of debt for money lent and interest, without shewing how the interest accrued, is bad.

Whether, since the 3 & 4 *Will.* 4, c. 42, s. 11, a defendant arrested by a wrong Christian name can apply to be discharged on motion, *quære*. *Callum v. Leeson*, 381

4. An affidavit of debt, sworn before the signer of the bills of *Middlesex*, before the 2 *Will.* 4, c. 39, was in force, will not authorize the issue of a writ of *capias* since that act came into operation. *Beck v. Young*, 462

5. In an affidavit on a bill of exchange, it is necessary to state the amount of the bill. *Westmacott v. Cook*, 519.

6. An affidavit of debt on a bill of exchange, in an action against the drawer, alleged that the bill having become due was wholly unpaid. On a motion to discharge the defendant out of custody because the affidavit did not sufficiently shew a default by the acceptor, the Court refused to interfere. *Weedon v. Medley*, 689

7. Where the arrest was on the 22nd of *May*:—*Held*, that it was too late, on *June* 4, to obtain the defendant's discharge on the ground of a defect in the affidavit, the sheriff having in the meantime been ruled to return the writ, and make his return. *Firley v. Rallett*, 708

8. An affidavit of debt for principal and interest due on a bill of exchange must shew what amount is due for principal independent of interest. *Latreille v. Hoepner*, 758

9. "*Bath*, in the county of *Somerset*, *Esq.*," is a sufficient description

in the *Common Pleas* of a deponent in an affidavit of debt.

In such an affidavit it is not incorrect to allege the defendant to be indebted to the plaintiff and his wife, administratrix.

If the debt was to the intestate on bond, the death of the latter need not be alleged, nor to whom the payment was to be made.

To warrant an *alias capias* into a second county, a fresh affidavit of debt, or a copy of the previous one, need not be filed, if the officer suing it out is deputy filacer for both counties. *Coppin v. Potter*, 785

10. A defendant waives an objection to an affidavit of debt, by inducing the plaintiff to accept of certain persons as bail, by affecting to acquiesce in the decision of a single judge as to the sufficiency of the affidavit. *Mammatt v. Mathew*, 797.

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2. It is too late to strike out counts on promises to the plaintiffs as executors, after the cause has been taken

down to trial at the assizes. *Tomlinson v. Nanny*, 17

3. In an action against the inhabitants of a place for damage done by a mob under the 7 & 8 Geo. 4, c. 31, the Court allowed the proceedings to be amended by substituting the word "borough" for "hundred," there being no such hundred, and the time for commencing a fresh action having expired. *Horton v. Stamford* (Inhabitants), 96

4. A judgment may be altered in the same term in which it is given. *Darling v. Gurney*, 101

5. An order to amend, although general in its terms, will only authorize the amendment with reference to which it is obtained. *Engleheart v. Eyre*, 193

6. Where the Christian and surname are transposed by mistake in an order of reference, the Court will allow that mistake to be amended. *Price v. Thomas James*, 435

7. In an action by executors, the defendant pleaded in abatement the nonjoinder of one executor (who had not proved). The Court allowed the proceedings to be amended, on payment of costs, as the Statute of Limitations would have been a bar to a fresh action. In future, no amendment will be allowed except to avoid the operation of the Statute of Limitations. *Lakin v. Watson*, 633

8. A plea was allowed to be amended after the plaintiff had replied, and the cause was in the paper, under special circumstances. *Jones v. Roberts*, 698

9. The Court will, on terms, in an action on a foreign promissory note, even after issue joined, allow a defendant to put in a plea, shewing that, by the foreign law, the plaintiff's right of action is tolled by lapse of time. *Huber v. Steiner*, 781

ANNUITY.

In an action on a bond conditioned

ARBITRATION.

for the payment of an annuity, an objection, that the bond was not enrolled as it ought to have been, cannot be taken advantage of under the plea of *non est factum*, but must be pleaded. *Mestayer v. Biggs*, 695

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APPROPRIATION OF PAYMENT.

1. If a debtor pays money to his creditor, without directions as to its appropriation, the creditor has a right to apply it in liquidation either of a judgment or simple contract debt. *Brazier v. Bryant*, 477

2. If a debtor pays money generally to his creditor, without any directions as to its specific appropriation, the creditor may apply it in liquidation either of a judgment or simple contract debt. If the creditor, under such circumstances, make no specific application, the money shall be applied to one or other account according to the presumed intention of the parties, to be collected from all the facts. *Chitty v. Naish*, 511

ARBITRATION.

See ADMINISTRATOR, 1—AMENDMENT, 4—AWARD, 6, 7, 8—LIEN, 3.

1. Where an action was brought by an attorney on a bill not taxable, and a verdict was taken, subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum:—*Held*, that it was competent for the Court to examine whether the arbitrator had adopted

the right rule. *Broadhurst v. Darlington*, 38

2. A plaintiff, who submits to arbitration, with a clause that if either party, by affected delay, or otherwise, prevents the arbitrator making an award, is liable to costs, where the arbitrator is prevented from making his award, in consequence of the plaintiff not being prepared with proper evidence, though he is ready to be examined in support of his own case. *Morgan v. Williams*, 123

3. Where, from the misconduct of the arbitrator, the original order of reference cannot be obtained, a duplicate may be made a rule of Court. *Thomas v. Philby*, 145

4. Where a cause was referred, and the plaintiff attended before the arbitrator by counsel, without giving distinct notice to the opposite party that he intended to do so, the Court ordered the cause to be referred back to the arbitrator, and disallowed the plaintiff his costs of the day. *Whatley v. Morland*, 249

Held, also, that the rule *nisi* in such a case ought to have specified the grounds of the motion.

5. An attachment for not performing an award will not be granted if an action has been commenced, except upon the terms of discontinuing the action, and paying the costs.

Where a cause and all matters in difference are referred, a recital in the award that the action was referred, without mentioning other matters in difference, does not constitute an objection to the award on the face of it.

Such an objection should be made the ground of a separate application to set aside the award, supported by affidavits shewing what were the other matters in difference.

A Judge's order for referring a cause may be made a rule of Court, though the defendant gave no authority to his attorney to consent to its

being made a rule of Court. *Paull v. Paull*, 340

6. After a lapse of eight years, the Court will not interfere to compel an arbitrator to refund a sum of money alleged to have been over-paid, particularly where the party who could explain the transaction is dead. *Brazier v. Bryant*, 757

7. If a party to a reference revokes the arbitrator's authority without a sufficient cause, he will be compelled to pay all the costs of the reference. *Smith v. Fielder*, 764

ARREST.

See PRIVILEGE FROM ARREST, 1.

It is no ground for discharging a defendant out of custody, that the plaintiff was not at the time of the arrest in possession of the bill of exchange on which the defendant was arrested, and that it was in the possession of persons to whom the plaintiff was indebted, and to whom he had indorsed it over, if it appears that those persons only hold the bill as trustees for the plaintiff, and are willing to give up the bill for the purposes of the suit. *Stone v. Butt*, 335

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ARREST (WITHOUT PROBABLE CAUSE).

See COSTS, 1, 2, 11, 13, 18, 19, 26, 27.

Where a defendant was held to bail in a much larger sum than the plaintiff recovered:—*Quære* whether, if it had been a case within the act 43 Geo. 3, c. 46, by reason of the absence of a reasonable or probable cause for holding to bail to such an amount, the mere fact of the defendant's not having been actually arrested would have been sufficient to deprive him of the benefit of that act? *Wilson v. Broughton*, 631



to him, so that he can read its contents, it is sufficient. *Calvert v. Redfearn*, 505

10. The rule for an attachment for non-payment of costs, pursuant to the Master's *allocatur*, between attorney and client, is *nisi* in the first instance. *Spragg v. Willis*, 531

11. The rule for an attachment for non-payment of costs between attorney and client is *nisi* in the first instance. *Boomer v. Mellor*, 533

12. A rule for an attachment for non-payment of costs may, under certain circumstances, be obtained without personal service. *Allier v. Newton*, 582

13. If, in consequence of bail not being put in and perfected, the plaintiff obtains an attachment against the sheriff, without having declared *de bene esse*, the latter may set aside the attachment, upon the defendant being rendered, without the attachment or bail-bond standing as a security. *Alexander v. Barrington*, 648

14. An attachment for non-payment of costs can only be granted on an affidavit of personal service. *Stunell v. Tower*, 673

ATTORNEY.

See ATTACHMENT, 6, 8—ATTORNEY AND AGENT, 1, 2, 3—ATTORNEY AND CLIENT, 1, 2—ATTORNEY'S BILL, 1—BARRISTER, 2—COSTS IN THE CAUSE, 1—DISCONTINUANCE, 2—EXCHEQUER SIDE CLERKS, 1—INSOLVENT, 1—JUDGMENT AS IN CASE OF A NONSUIT, 23—LIEN, 1, 2, 3—MASTER'S DISCRETION, 4—NULLITY, 2—SECOND ACTION, 2—STAYING PROCEEDINGS, 1—SUMMONS, 2—TAXATION, 1, 5, 6, 7—VENUE, 6, 10—UNIFORMITY OF PROCESS ACT, 3—WAIVER, 3, 4.

1. Where there appears to be negligence or ignorance of law on the part of an attorney, which creates unnecessary costs, the Court will order

those costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliffe v. Prosser*, 21

2. An attorney who is a party to a suit is not entitled to charge a guinea a day for attending the trial, though he acts as his own attorney, unless it appears that it was necessary he should attend in person. *Leaver v. Whalley*, 80

3. A verdict having been obtained against an attorney, in an action for publishing a libel of a very aggravated nature, but in which the jury only gave 1s. damages, the Court refused to strike him off the roll on the mere ground of the publication of that libel.

Semble—That the Court will not strike an attorney off the roll, unless for some misconduct in his business of attorney, or where criminal proceedings have been taken against him. *Ex parte* — 110

4. Where a plaintiff was nonsuited, and a rule *nisi* was afterwards granted to set aside the nonsuit on payment of costs, and then the parties entered into an arrangement, without the intervention of the defendant's attorney, to settle the action, by the defendant's giving a bill of sale and warrant to the plaintiff for his debt and costs, but without providing for the costs due by the defendant to his attorney, and the attorney thereupon got the rule discharged for setting aside the nonsuit:—*Held*, he was justified in so doing. *Young v. Redhead*, 119

5. In all cases, the order for changing an attorney must be served on the opposite party. *Rex v. Sheriff of Middlesex*, 147

6. The Court can only interfere to compel an attorney to deliver up deeds in his possession, at the instance of the party who deposited them with him. *In re Thornton, Gent.*, 156

9. An attorney, by employing another to bring an action for him, waives his privilege, and therefore cannot, as a matter of course, try his cause in the county of *Middlesex*.

Harrington v. Page, 164

10. Severe illness, under certain circumstances, will be considered as an excuse for not complying with the rule of Court, in putting up notices in the *K. B.* Office and outside the Court of *K. B.*, a term before applying for admission as an attorney. *Ex parte Herbert*, 172

11. *2 Reg. Gen. H. T. 2 Will. 4*, as to the indorsement of the amount of debt and costs demanded by the plaintiff, applies to process issued against attorneys under *2 & 3 Will. 4*, c. 39. *Tomkins v. Chilcote*, 187

12. Where an attorney has by accident omitted to pay the proper amount of certificate duty for some years, as also to take out his certificate during another period, and has practised during that time, the Court will re-admit him on payment of the arrears of duty and a nominal fine. *Ex parte Jones*, 199

13. An attorney seeking to be re-admitted, sufficiently complies with the rule as to a term's notice previous to his application, by sticking it up in the *King's Bench* Office on the

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will not summarily compel him to fulfil it. *In re G. Chitty*, Gent., 421

20. If an attorney has practised abroad during a period for which he has not taken out his certificate, he may be re-admitted without payment of arrears of duty or fine. *Ex parte Philcox*, 450

21. Where an attorney has been admitted, but has never taken out his certificate, he is entitled to take it out without re-admission. *Ex parte Jones*, 451

22. Where an attorney seeks to be admitted, he does not sufficiently comply with the rule of *T. T. 33 Geo. 3*, by sticking up the notice of his intention to apply in the *King's Bench* Office and outside the Court, before the sitting of the Court on the first day of the term in which he seeks to be admitted. *Ex parte Gordon*, 470

23. Where a plaintiff's attorney receives a sum of money from the defendant, it is incumbent on the plaintiff to shew that the receipt was without his authority, otherwise it is money paid to his use. *Vorley v. Garrad*, 490

24. Where an attorney received a promissory note from the father of a clerk articulated to him as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he did negotiate it contrary to his undertaking, the Court compelled him to take it up. *Ex parte Gardner*, 520

25. The Court will not interfere summarily to compel an attorney to pay over or account for money received by him during his clerkship. *Ex parte Deane*, 533

26. The right names of all the persons with whom a clerk has served during the five years must be introduced into the notices of his intention to apply for admission. *Ex parte Dobson*, 539

27. The Court will not interfere summarily to try the question of negligence on the part of an attorney towards his client's interests. *Brazier v. Bryant*, 601

28. On applying to re-admit an attorney, it is sufficient if the affidavit clearly shews by its statements that he must have been admitted, without positively stating the fact. *Ex parte Wentworth*, 606

29. Where an attorney was charged with oppression towards his client, but the application was not made till after three terms had nearly elapsed, and no attempt was made to explain the delay, it was held that the motion was too late. *Garry v. Wilks*, 649

30. It was held to be no ground for making an application against an attorney, that he had advised his client to hand him over money which the Insolvent Debtors' Court, on the client's application there for his discharge, considered a misappropriation, and for which he was remanded by that Court. *Smith v. Tower*, 673

31. A rule for striking an attorney off the roll for misconduct being referred to the Prothonotary, he may receive any evidence tending to elucidate the matter.

On a reference to the Prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired:—The Court discharged the rule on payment of costs by the attorney. *Dicas v. Warne*, 812

32. Defendant having paid the debt, plaintiff's attorney proceeded for costs. The attorney being uncertificated, and therefore not entitled to sue for costs, the Court stayed the execution. *Meekin v. Whalley*, 823

33. It is not competent to an attorney who has not been inrolled to sue for fees or disbursements; where,

therefore, the defendant's attorney (duly qualified in other respects to act as an attorney) had omitted to cause himself to be inrolled, and the defendant had made no advance on account of the suit, the Court allowed the plaintiff to discontinue without costs. *Humphrys v. Harvey*, 827

ATTORNEY AND AGENT.

1. If the agent of an attorney does wrong, the client cannot make a summary application against the agent. *Ex parte Jones*, 161

2. Where a *London* agent has been employed to attend the trial of a cause, it is a matter within the discretion of the Master, whether the costs of a journey to *London* by the country attorney to attend the trial of the cause shall be allowed. *Par-sloe v. Foy*, 181

3. If a *London* agent receives money improperly, the remedy of the client is not against him, but against his attorney. *Gray v. Kirby*, 601

ATTORNEY AND CLIENT.

See ATTACHMENT, 10, 11—ATTORNEY, 16—ATTORNEY'S BILL, 1—BANKRUPT, 1.

1. An attorney having taken a bill of exchange from his client in payment of a bill of costs, but the bill of exchange not being paid, the attorney had been sued upon it, the Court allowed him to pay the costs of taxing his bill (more than a sixth having been taken off) to the holder of the bill, in part payment. *Woolison v. Hodgson*, 551

2. An attorney with whom a will has been deposited by the testator will not be compelled to deliver it up to the sole legatee under it. *Ex parte Crisp*, 455

ATTORNEY'S BILL.

See MASTER'S DISCRETION, 3—TAXATION, 9.

1. An attorney employed to defend

an action, and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it. *Woolison v. Hodgson*, 360

2. An application to tax an attorney's bill ought to be made at chambers. *Bassett v. Giblett*, 650

AWARD.

See COSTS, 25—LIEN, 2.

1. Where a verdict has been found, subject to a reference, and the award has not been made until some terms afterwards, judgment cannot be entered up as of the term next after the verdict, without special application to the Court. *Brooke v. Fearn*, 144

2. A motion to set aside an award, made under an order of *Nisi Prius*, must be made within the first four days of the next term, though it is for objections apparent on the face of the award. *Sell v. Carter*, 245

3. A motion to set aside an award made under an order of a Judge must be made promptly after the party knows of the award being made. Where such a motion was made after two terms had elapsed, the Court discharged it with costs, though it was alleged by the party moving, that he did not believe that the other party intended to proceed upon the award, as there had been a previous revocation. *Worrall v. Deane*, 261

4. An award made by a barrister cannot be impeached, on the ground of his having decided contrary to law. *Wade v. Malpas*, 638

5. Where a rule to set aside an award is made into a special case, the counsel who objects to the award ought to begin and have the reply. *Dippins v. Marquis of Anglesea*, 647

6. Where matters in difference are referred to a legal arbitrator absolutely, the Court will not entertain a motion for reviewing his decision either upon the law or the facts.

AWARD.

If the reference is to a non-legal arbitrator, the Court will review his decision as to a point of law, but not upon the facts, unless his award appears so glaringly wrong as to induce a suspicion of misconduct.

Where a cause was referred to an attorney and another person, the Court granted a rule for setting aside the award upon a point of law. *Ashton v. Poynter*, 651

7. If a cause is referred to a barrister, and he improperly admits evidence, the Court will not disturb his award. *Perryman v. Steggall*, 726

8. Where costs are to abide the event of an award, and the arbitrator omits to give any opinion as to some counts of the declaration, the award is bad. *Norris v. Daniel*, 798

BAIL.

See AFFIDAVIT OF DEBT, 10—ATTACHMENT, 3—BAIL-BOND, 4—BANKRUPT, 3—FELONY—PAYMENT INTO COURT, 1, 6—REG. GEN. T. 4 W. 4, 397; M. 4 W. 4, 769—RENDER, 1—TENDER, 1—UNIFORMITY OF PROCESS ACT, 10.

1. Where the notice of bail omitted to state the residences of the bail for six months, and whether they were housekeepers or freeholders:—*Held*, that this was not such a defect as entitled the plaintiff to treat it as a nullity, and an attachment against the sheriff was set aside. *The King v. The Sheriff of Middlesex*, 5

2. The affidavit of justification must agree with the form: it is not sufficient that it is equivalent. *Okill's Bail*, 19

3. If bail justify by affidavit, which states they are "possessed" instead of "worth," &c., the plaintiff is not liable to pay the costs of an unsuccessful opposition. *Thompson's Bail*, 50

4. Affidavits of justification, which merely state that the bail is "pos-

BAIL.

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sessed" instead of "worth," will not in future be allowed to be amended.

Worlison's Bail, 53

5. 1 Reg. Gen. T. T. 1 W. 4, as to giving four days' notice of justification, only applies where the bail justify at the time of putting in. *Jones's Bail*, 159

6. In order to obtain time to justify bail in error, on account of the bail suddenly leaving town, it must be sworn that the fact of such departure was a surprise on the defendant. *Rogers' Bail*, 197

7. The affidavit of sufficiency made by bail pursuant to the rules of Trinity Term, must state the bail to be "worth" and not "possessed of" the required sum. *Harrison's Bail*, 198

8. It is sufficient if the notice of bail given by a prisoner is signed by him as being "in custody," though it does not state in the usual way that he is a prisoner. *Frith's Bail*, 229

9. The notice of special bail need not state where the bail-piece is filed. *Wigley v. Edwards*, 282

10. A notice of bail describing him as a housekeeper is insufficient, if he is only a lodger, although on examination it appears that he is a freeholder. *Wilson's Bail*, 421

11. Where a bail has misdescribed his place of residence on justification, but has been allowed to pass, the Court will not set aside the rule for the allowance of the bail, but he may be indicted for perjury. *Eaglefield v. Stephens*, 438

12. Where one of the bail put in for a prisoner justifies, time must be granted for justifying another; if neither justified, it would not have been necessary. *Foy's Bail*, 442

13. If a bail has two places of residence, it is only necessary to state one of them in the notice. *Fortescue's Bail*, 541

14. The rule of 5 Reg. Gen. T. T. 1 Will. 4, as to changing bail, does

16. In order to obtain the costs of justifying bail, an application should be made at the time of justification.

Frcam v. Best, 590

17. A notice of bail, describing them as of a parish merely is sufficient.

An affidavit of justification, giving the deponent's residence, without his addition, is bad. *Treasure's Bail*, 670

18. "Gentleman" is a good description of a clerk in the Post Office.

The place where the affidavit of justification was sworn need not be mentioned. *Wood v. Ray*, 692

19. Bail are only liable by 1 *Reg. Gen. H. T. 2 Will. 4, s. 21*, to the extent of the single amount of one recognizance, or to the debt sworn to and costs of suit, if their amount be less. *Vansandau v. Nash*, 767

20. If a security for debt and costs is taken by a plaintiff from the defendant with the consent of the bail, and that security fails, reasonable notice must be given to them of that failure.

Surman v. Bruce, 777

21. 5 *Reg. Gen. T. T. 1 Will. 4*, as to changing bail, applies to bail put in by the sheriff as well as that put in by a party. *Rex v. The Sheriff of Essex*, 782

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BAIL-BOND.

BANKRUPT.

certificate is a bar to the plaintiff's claim. *Metcalf v. Watling*, 552

2. The person of a defendant is discharged by certificate, after prior insolvency, although 15s. in the pound were not paid.

In such case the certificate being proved, but the verdict entered generally, the Court will make use of affidavits to ascertain the fact of such proof.

After such general finding, the defendant being taken in execution, he may at once apply to be discharged without moving to restrict the judgment. *Carew v. Edwards*, 613

3. In the case of a London as well as a country commission, the Court, on behalf of bail, will, to prevent inconvenience, allow the time for the render to be enlarged. *Ruston v. Greene*, 617

4. Interlocutory costs payable under an order of *Nisi Prius* by a defendant, previous to his bankruptcy, are proveable under the fiat, and therefore the certificate is a discharge from them, although an attachment has been obtained before the certificate is allowed.

Before the Court will discharge the bankrupt the certificate must be inrolled. *Jacobs v. Phillips*, 716

5. The 59th section of the 6th Geo. 4, c. 16, which operates a stay of proceedings in an action commenced against the bankrupt before the issuing of the commission, where the plaintiff elects to prove the debt, does not apply to the case of a fiat sued out by the plaintiff himself. *Eicke v. Nokes*, 820

BARRISTER.

See AWARD, 4, 7—COURT OF REQUESTS, 3—PRIVILEGE FROM ARREST, 1.

1. No affidavit is required from counsel as to what passes between them. *Igulden v. Terson*, 277

CAPIAS.

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2. An application for a rule requiring an attorney to answer the matters of an affidavit must be made by a gentleman at the bar. *Ex parte Pitt*, 439

3. An attachment for misconduct cannot be moved for by a complainant in person, but the motion must be made by a gentleman at the bar. *Ex parte Fenn*, 527

BRINGING MONEY INTO COURT.

See NEW TRIAL, 4.

CAPIAS.

See BAIL-BOND, 2 — CONCURRENT WRITS, 2 — SHERIFF, 7 — WARRANT, 1.

1. A variance in the name of a defendant in a writ, where it is *idem sonans* with the real name, is not material.

The description of a defendant in the *capias*, as of *Kent Street*, in the county of *Surrey*, without the number of the house, or parish, where situate: — *Held* sufficient.

The indorsement on the writ need not be dated; and "bail for 40l. and upwards," though uncertain, is sufficient, since the late rule of 1 *Reg. Gen. H. T.* 2 *W.* 4, s. 10. *Webb v. Lawrence*, 81

2. "*Gray's Inn Square, London*," held a good description in a writ of the residence of the plaintiff, an attorney, within the Uniformity of Process Act, though it was sworn that *Gray's Inn* was not in *London*. *King v. Monkhouse*, 221

3. If the place of residence of the defendant is not inserted in the writ of *capias*, it may be set aside at the instance of the defendant, though his residence is stated in the copy of the writ. *Rice v. Huxley*, 230

4. In bailable process, it is not necessary to give a particular description of the defendant's place of residence.



COGNOVIT.

and state that he subscribes as such, means, that such declaration and statement should be in writing.

Semble, also, that a substantial compliance with the rule is not sufficient, if the express terms of the rule are not fulfilled. *Fisher v. Nicholas*, 251

2. It is not necessary to declare previous to signing judgment on a *cognovit*. A *cognovit* does not require a stamp, although the plaintiff at the time of its execution undertakes on a separate paper to give the defendant time. *Morley v. Hall*, 494

COMMENCEMENT OF ACTION.

The writ is now the commencement of the action for all purposes. *Thompson v. Dicas*, 93

COMPOUNDING A PENAL ACTION.

On a motion to compound a penal action, it must appear that the defendant has pleaded. *Rex v. Collier*, 581

CONCILIUM.

See 6 & 14 REG. GEN. H. 4 W. 4, 305, 307.

Where the *concilium* is served so late that the opposite party has not time to prepare and deliver the demurrer books two days before the day for argument, the Court will not allow the demurrer to be argued, though it is stated to be a plea pleaded for delay; and the defendant will be entitled to his costs for appearing to make the objection. *Britten v. Britten*, 239

CONCURRENT WRITS.

1. A plaintiff may sue out a *ca. sa.* before the return of a *fi. fa.* previously issued, if the latter writ has not been executed. *Dicas v. Warne*, 762

2. A plaintiff may issue a second *capias* before the return of one pre-

CONTEMPT.

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viously sued out. *Dunn v. Harding*, 803

CONDITIONAL DISCHARGE.

See OUTLAWRY, 1.

CONDITIONAL ORDER.

See ATTACHMENT, 4.

CONSENT.

See JUDGE'S POWER, 1.

CONSPIRACY.

See VENUE, 9.

CONSTABLE OF DOVER CASTLE.

See MASTER'S DISCRETION, 6.

CONTEMPT.

See ATTACHMENT.

1. In order to bring a party into contempt for non-delivery of a bond, pursuant to a rule of Court, the demand of it must be made by one of the parties mentioned in the rule as entitled to receive it. *Ex parte Fortescue*, 448

2. Where a demand is made of money, pursuant to the Master's *allocatur*, by or under the authority of a power of attorney, a copy of the power must be left with the defendant in order to bring him into contempt for non-payment. *King v. Packwood*, 570

CONTINUANCE OF PROCESS.

See TESTE OF WRIT, 1.

1. An *alias capias* may be issued more than four months after the expiration of the first *capias*, without affecting the validity of the former writ; and the continuances between the first writ and the subsequent writ may, as formerly, be entered at any time, unless the writs are issued with a view to avoid the Statute of Limitations; in which case only the

CONTINUANCE (ENTRY OF).

See 2 **REG. GEN. H. T. 4 W. 4,**
(**PLEADING RULES**), 313.

CONTRIBUTION.

See **TAXATION**, 7.

CONVICTION.

See **GAME ACT.**

CORONER'S INQUISITION.

If a coroner's inquisition states it to have been taken on the affirmation of a man, it should state that man to be either a *Quaker* or a *Moravian*.
Rex v. Polfield, 469

COSTS.

See **ABSENCE OF WITNESS**, 1—**ADMINISTRATION**, 1—**ARBITRATION**, 4, 7—**ARREST**, (WITHOUT PROBABLE CAUSE), 1—**ATTORNEY**, 2, 32—**ATTORNEY AND AGENT**, 2—**ATTACHMENT**, 4, 5, 8, 9, 14—**ATTORNEY AND CLIENT**, 1—**AWARD**, 8—**BAIL**, 16—**BANKRUPT**, 4—**CONCILIUM**, 1—**COSTS IN THE CAUSE**, 1, 2—**COUNTY COURT ACT**, 1, 2, 3—**COURT OF REQUESTS**, 1, 2—**DIRECTIONS TO TAXING OFFICERS**, 485—**ERROR**, 3—**EXECUTORS**, 3, 4—**EXECUTION**, 7—**FOREIGN WITNESS**, 1—**HUSBAND**

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trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial, with reference to those given on the first. *Wilkinson v. Malin*, 65

7. Where several special counts are inserted on the same agreement, the plaintiff is entitled to a verdict on one count only, and to the costs of that count. A bill of exceptions would lie, if a Judge were to direct that all the counts were proved. Costs of a rule for reviewing a taxation are not given where the mistake is with the Master. *Ward v. Bell*, 76

8. Where libellous and impertinent matter was introduced into an affidavit in support of a rule, the Court deprived the party of the costs of the rule, to which otherwise he would have been entitled. *Thompson v. Dicus*, 93

9. If a defendant resides or inhabits within London, he is liable to be sued in the London Court of Requests for debts under 5*l.*; and if a plaintiff sues him elsewhere, and recovers less, he will not be entitled to costs, though the defendant has another place where he occasionally resides, and the goods are delivered there. *Rice v. Legh*, 105

10. Where, in trespass, the jury found for the defendant upon a plea which went to the whole cause of action, and the Judge thereupon discharged them as to the other issues:—*Held*, that the defendant was not entitled to the costs of the pleadings or witnesses in respect of the issues upon which no verdict was given. *Vallance v. Adams*, 118

11. If a cause has been removed by *hab. corp.* into the King's Bench from the Palace Court, and the plaintiff recovers less than the sum for which the defendant was arrested, the former Court cannot grant the defendant his costs, under the 43

Geo. 3, c. 46, s. 3. Connel v. Watson, 139

12. If the jury find immaterial issues in favour of a defendant, and the plaintiff has afterwards judgment *non obstante veredicto*, neither party is entitled to the costs of those issues. *Goodburne v. Bowman*, 206

13. Where the sum for which the defendant is arrested bears no proportion to the sum which is ultimately recovered, not being reduced by a set-off, it shews such a *prima facie* case of want of reasonable or probable cause for the arrest as is sufficient to call on the plaintiff to shew that he had a reasonable or probable cause; otherwise, the defendant will be entitled to his costs under the 43 *Geo. 3, c. 46. Summers v. Grosvenor*, 224

14. In an action for *mesne profits*, the plaintiff is entitled to receive only the taxed costs of the ejectment, and not the extra costs. *Doe v. Hare*, 245

15. In an action of slander, the jury gave 50*l.* damages on the first count, and 100*l.* damages on the other nine counts, one of which latter counts was held bad in error; and the plaintiff agreed to remit the 100*l.* damages:—*Held*, that he thereby gave up all the costs on the last nine counts. *Dann v. Crease*, 269

16. Where a motion was made to compel a defendant to produce an instrument to have it stamped, the Court, on making the rule absolute, refused to allow more costs than the plaintiff would have been entitled to if the application had been made to a judge at chambers. *Vaughan v. Trewent*, 299

17. Where some issues are found for the plaintiff and some for the defendant, the latter is entitled to the costs of the issues found for him, but not to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related

exclusively to the issues found for him. *Larnder v. Dick*, 333

18. To entitle a defendant to apply for costs under the 43 *Geo. 3*, c. 46, s. 3, a mere holding to bail is not sufficient—there must be an arrest and holding to bail. *Bates v. Pilling*, 367

19. The defendant cannot apply for costs under the 43 *Geo. 3*, c. 46, s. 3, where he has paid money into Court which is taken out by the plaintiff. *Rome v. Rhodes*, 384

20. Where a new trial is granted, and nothing said in the rule of the costs of the former one, and after various subsequent proceedings one party succeeds, he is not entitled to the costs of the first trial. *Newberry v. Colvin*, 415

21. Under 1 *Reg. Gen. H. T. 2 Will. 4*, s. 74, the defendant is entitled to the costs of all issues found for him, although they exceed the costs of those found for the plaintiff. *Milner v. Graham*, 422

22. Where a party shews cause successfully in the first instance, he is not entitled to costs. *Fitch v. Green*, 439

23. Costs in Chancery cannot be set-off against costs on a rule of this Court. *Wenham v. Fowle*, 444

24. If a defendant pleads the general issue and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas. *Hart v. Cutbush*, 456

25. A cause (in which money had been paid into Court) was referred, with all matters in difference, the costs to abide the event. The arbitrators found that the plaintiff had no cause of action, but that there was a sum of 10*l.* due from the defendant for money lent to his wife, which was paid into Court:—*Held*, that the

plaintiff was liable to pay the costs. *Dawson v. Garrett*, 624

26. If the plaintiff arrests a defendant for one side of a mutual account, without giving credit for what he knows to be due from himself, although the defendant has refused to deliver his account, the latter is entitled to his costs under the 43 *Geo. 3*, c. 46, s. 3. *Ashton v. Naull*, 727

27. If a plaintiff arrests a defendant for 27*l.*, and recovers only 10*l.* in consequence of a set off, the Court will allow the defendant his costs, although the set-off was not quite undisputed. *Sims v. Jaquest*, 800

28. Where one of several defendants in an action on the case suffers judgment by default, and the rest obtain a verdict, they are entitled to costs. *Price v. Harris*, 804

29. If there is reasonable or probable cause for bringing an action as executor or administrator, and the plaintiff is nonsuited, he will not be liable to costs, notwithstanding the 3 & 4 *Will. 4*, c. 42, s. 31. *Lysons v. Barrow*, 807

30. The tenant in a writ of intrusion is not entitled to costs where the demandant enters a *nolle prosequi*. *Williams*, dem. *Harris*, ten. 819

COSTS OF THE DAY.

See JUDGMENT AS IN CASE OF A NON-SUIT, 2, 4—PAUPER, 1, 2.

1. Where a plaintiff withdrew the record at the *Spring Assizes* (after having given notice of trial), on account of some supposed defence which it was intimated would be set up on the other side, but at the *Summer Assizes* obtained a verdict, and since then his costs had been taxed:—*Held*, that a motion for the costs of the day, for not trying at the *Spring Assizes*, was not too late in *Michaelmas Term* following. *Redit v. Lucock*, 247

COSTS IN THE CAUSE.

2. The Court will not make the payment of the costs of the day a condition precedent to the plaintiff's proceeding to a second trial. *Doe d. Evans v. Edwards*, 572

3. A proposal to refer, made after the commission day, held not to warrant the plaintiff in not proceeding to trial, and that he was liable to pay the costs of the day. *Eaton v. Shuckburgh*, 624

COSTS IN THE CAUSE.

See COSTS, 17, 24—EXECUTORS, 3.

1. If an attorney shew cause on his own behalf, against a rule for a new trial, or a *stet processus*, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the Court; and if that application is not made when the rule is disposed of, the Court will not afterwards amend the rule as to them. *Southee v. Terry*, 522

2. Where a defendant is discharged out of custody, on the ground of coverture or arrest by a wrong name, the costs of the application are not costs in the cause, and therefore the defendant is not entitled to them if the plaintiff discontinues. *Mummery v. Campbell*, 798

COUNSEL.

See BARRISTER, 1.

COUNTY COURT.

1. An affidavit in support of an application for double costs, under the 23 *Geo. 2*, c. 33, s. 9, (the *Middlesex* County Court Act), must state the defendant to be liable to be summoned to the County Court. *Unwin v. King*, 492

2. In an affidavit supporting an application for double costs under the 23 *Geo. 2*, c. 33, s. 19, (the *Middlesex* County Court Act), it must be

CROWN DEBTOR. 853

stated that the defendant is liable to be summoned to the County Court. *Fossett v. Godfrey*, 587

3. In order to deprive a plaintiff of his costs, under the *Middlesex* County Court Act, the application must be made before final judgment. *Unwin v. King*, 593

COURT OF REQUESTS.

See COSTS, 5, 9.

1. Under the *London* Court of Requests Act, it is no objection to the defendant's claim for costs, that the plaintiff was unaware that the defendant resided within the jurisdiction. *Crowder v. Bell*, 508

2. An action for not using a farm in a tenant-like manner is not within the meaning of the 46 *Geo. 3*, c. 66, (the *Isle of Wight* Court of Requests' Act). *Wittam v. Urry*, 543

3. A barrister within the jurisdiction of the 39 & 40 *Geo. 3*, c. civ., (the *London* Court of Requests' Act) must be sued in that Court for claims under 51. *Wettenhall v. Wakefield*, 759

CROSS-EXAMINATION.

A witness merely called to produce a document, although sworn, and asked a question, but which he does not answer, is not liable to cross-examination. *Rush v. Smith*, 687

CROWN DEBTOR.

1. A Crown debtor, who has issued prerogative process against his own debtor, is not entitled to continue those proceedings after he has paid his debt to the Crown, and after the defendant has obtained the benefit of the Insolvent Act, and been thereby discharged from the debt due to the Crown debtor. *In re Hollis v. Bingham*, 128

2. A defendant, against whom process is issued out of the *Exchequer* at the suit of the Attorney-General, is at liberty to appear in person, and to have



DETAINDER.

2. It is not a ground of general demurrer, that the plaintiff, in an action against bail, is stated to have brought a bill into Court, if upon the whole record it appears to be a proceeding by *scire facias*. *Darling v. Gurney*, 235

3. Where the writ was in debt, and the declaration was jointly in *assumpsit*, the Court refused to set them aside as being irregular, but left the party to demur. *Rotton v. Jeffery*, 637

Reg. Gen. H. 4 W. 4.

Demurrer delivered not filed. *Reg. 1*, 304

Points stated before demurrer signed. *Reg. 2*, *Ibid.*

Points not stated may be argued. *Reg. 2*, *Ibid.*

No rule to join in demurrer. *Reg. 3*, *Ibid.*

Joinder not to be signed. *Reg. 4*, *Ibid.*

Issue and demurrer, how made up. *Reg. 5*, 305

Special case and demurrer set down without *concilium*. *Reg. 6*, *Ibid.*

Paper books, how delivered. *Reg. 7*, *Ibid.*

See 14 REG. GEN. H. T. 4 W. 4, 319.

DEMURRER-BOOK.

See CONCILIUM, 1.

DESCRIPTION OF PARTIES.

See 21 REG. GEN. H. 4 W. 4, 321.

DETAINDER.

1. The provision of the Uniformity of Process Act, as to the indorsement on a writ of detainer of the amount for which the defendant is to be detained, is *compulsory*, and not merely *directory*. *Jones v. Price*, 410

2. A writ of detainer directed "to the Marshal of our prison of the Mar-

DISTRESS.

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shalseu," instead of "the Marshal of the *Marshalsea* of our Court before us:"—*Held* irregular, and the defendant was discharged out of custody. *Storr v. Mount*, 417

DEVASTAVIT.

See EXECUTORS, 2.

DISCHARGE.

See OUTLAWRY, 1.

DISCLAIMER.

See SECOND ACTION, 2.

DISCONTINUANCE.

See COSTS IN THE CAUSE, 2—PAYMENT INTO COURT, 2.

1. Where goods had been obtained by fraud, and the plaintiff commenced an action against the person who obtained the goods, and other persons represented as his partners, but who could not be found, the Court gave leave to discontinue the first action without paying costs, and to detain the defendant in custody until the plaintiff had issued a new writ against him alone, and declared against him. *Ames v. Ragg*, 35

2. Where a defence is carried on in the name of a person not an attorney of the Court in which the action is brought, the plaintiff may discontinue, on payment of the sums advanced by the defendant to his attorney, and without costs, if none have been advanced. *Paterson v. Powell*, 738

3. A discontinuance of the writ, where that is the only step taken, is a discontinuance of the cause. *Richards v. Stuart*, 754

DISTRESS.

See SHERIFF, 3.

DISTRINGAS.

See MEMBER OF PARLIAMENT, 1.

1. To found an application for a *distringas*, it must be shewn that the defendant is at home or in the neighbourhood during the time that the party calls to serve him. *Price v. Bower*, 1

2. Six calls to serve a writ on a defendant, and the only answer obtained was, that he was out of town: —*Held*, not sufficient to get a *distringas*. *Waddington v. Palmer*, 7

3. Where the defendant cannot be served personally with the summons or *distringas*, the Court will not allow an appearance to be entered, unless the affidavit is strictly accurate, and it is shewn that no reasonable means have been left untried to serve the defendant. *Scarborough v. Evans*, 9

4. To obtain a *distringas*, the copy must be left at the last time of calling. *Hill v. Moule*, 10

5. Where a defendant is absent at the time of the endeavour to serve a writ of summons, a *distringas* cannot be moved for unless there are grounds shewn from which the Court can infer that the defendant keeps out of the way to avoid being served. *Simpson v. Graves (Lord)*, 10

6. Where the defendant resides in ready furnished lodgings, the Court will not allow an appearance to be entered for him upon a return of *nulla bona* and *non est inventus* to a *distringas*, unless it is sworn that the defendant has no goods on which the sheriff can levy. *Cornish v. King*, 18

7. A *distringas* for proceeding to outlawry may be grantable under circumstances which would not entitle the plaintiff to a *distringas* to compel an appearance.

Scmble, that a defendant may now be outlawed in the *Exchequer*. *Jones v. Price* 42

DISTRINGAS.

8. To induce the Court to allow an appearance to be entered for a defendant, the affidavit must shew what means have been taken to execute the *distringas*. *Balgay v. Gardner*, 52

9. Where three attempts have been made to serve a *distringas*, which have been rendered ineffectual by the conduct of the defendant or his agents, the Court will allow an appearance to be entered for him. *Tring v. Gooding*, 162

10. If, upon calling to serve a writ of summons, the answer given is, that the defendant is out of town, it must be shewn to the Court, that, from inquiries made, there is reason to believe that the answer is false. *Smith v. Hill*, 225

11. The Court will not grant leave to enter an appearance for the defendant, unless they are satisfied by affidavit that every means to find him or give him notice have been tried. *Saunderson v. Bourn*, 338

12. Service of a writ of summons to procure a *distringas*. All the three calls need not be made by the same person. *Smith v. Good*, 398

13. To obtain a *distringas*, it is not sufficient that three calls are made, if the day and hour for the two subsequent calls are not mentioned, unless it is evident that the defendant endeavours to keep out of the way. *Johnson v. Disney*, 400

14. In order to obtain a *distringas*, the person endeavouring to serve the summons must appoint the day and hour at which he will make his subsequent calls. *Wills v. Bowman*, 413

15. In executing a *distringas*, it is sufficient that the sheriff should take all the property on the premises, although it amounts to less than 40s.; and, on the sheriff's return, the plaintiff will be entitled to enter an appearance for the defendant. *Jones v. Dyer*, 445

16. The attempts to serve a summons, in order to obtain a *distringas*, may be made in the same day, if it appear that the defendant is purposely keeping out of the way. *White v. Western*, 451

17. The Court refused to set aside a *distringas* for irregularity, because, in the copy of the writ of summons which was left, the name of *Andrew Bryan* was put as the defendant's name, instead of *Andrews Bryan*. *Tyser v. Bryan*, 640

18. If a defendant seeks to set aside the service of a writ of *distringas*, on the ground of defective indorsements and variance from the summons, his application is too late after the lapse of eighteen days. *Wright v. Warren*, 724

DOCUMENTS (PROOF OF).

See CROSS-EXAMINATION, 1—20 REG. GEN. H. 4 W. 4, 308.

DOVOR CASTLE (CONSTABLE OF).

See MASTER'S DISCRETION, 6.

DRUNKENNESS.

See COSTS, 2.

DURESS.

See INSOLVENT, 1—SETTING ASIDE PROCEEDINGS (FOR IRREGULARITY), 2.

A *cognovit* given by a defendant against whom a writ had been issued, and who, from the conduct of the parties, was led to believe he was under duress, no attorney being present, was set aside, though it was positively denied that he was in custody, or that a warrant had been issued against him. *Turner v. Sham*, 244

EJECTMENT.

See INFERIOR JURISDICTION, 1 — LANDLORD AND TENANT, 1, 3 — POSSESSION (WRIT OF), 1—SHERIFF, 3—STAYING PROCEEDINGS, 8—

TRUSTEE, 1—VACANT POSSESSION, 1—WRIT OF RIGHT, 1.

1. Where, in a declaration in ejectment, the lessors of the plaintiff are described to be executors, the affidavit of service need not, in stating the name of the cause, notice the character of the lessors stated in the declaration. *Doe d. Jenks v. Roe*, 55

2. Service of declaration in ejectment is not sufficient on the wife, unless it is stated to have been on the premises, or that she was living with her husband. *Doe d. Williams v. Roe*, 89

3. Service in ejectment. *Doe v. Roe*, 184

4. If a declaration in ejectment is intitled of a term which has not yet arrived, the error is not material. *Doe v. Roe*, 186

5. If the term in which a declaration in ejectment requires an appearance to be made is suffered to elapse, judgment against the casual ejector may be obtained in the following term on the same service. *Doe v. Roe*, 196

6. Service in ejectment. *Doe v. Roe*, 198

7. Service of the declaration in ejectment on the wife on the premises, and reading over the notice without explaining it, is sufficient. *Doe v. Roe*, 199

8. The *capias* against the nominal plaintiff in an ejectment need not now be issued previously to moving for an attachment against the lessor of the plaintiff, for non-payment of costs to the defendant after verdict. *Doe d. Fry v. Fry*, 265

9. Where the notice at the foot of a declaration in ejectment was to appear in *Michaelmas* Term, and the motion for judgment was not made till *Hilary* Term, the Court refused to grant a rule, unless the defendant had an opportunity of shewing cause. *Right d. Jeffery v. Wrong*, 348

time; the deponent's belief will not do. *Doe v. Roe*, 413

12. Service on the daughter on the premises will not suffice, unless it is shewn that the declaration came to the hands of the father, with proper explanation. *Doe v. Roe*, 414

13. Service on an under joint-tenant is a good service on him and a joint-tenant. *Doe d. Hutchinson v. Roe*, 418

14. It is not sufficient to state in the notice at the foot of a declaration in ejectment, that the tenant is "to appear in due time." *Doe d. Forbes v. Roe*, 420

15. The Court will not grant judgment against the casual ejector, when, from the affidavit in support of the motion, it appears that the premises are vacant. *Doe d. Norman v. Roe*, 428

16. Service of a declaration in ejectment. *Doe d. Courthorpe v. Roe*, 441

17. Service in ejectment. *Doe d. Wetherell v. Roe*, 441

18. Service in ejectment. *Doe d. Mortlake v. Roe*, 444

19. Service in ejectment. *Doe d. Fisher v. Roe*, 449

20. The Court will grant a rule nisi for judgment against the casual ejector, where the nature and object

23. See *Harris v*

24. E rules of and a d concluding rect. *D*

25. A plaintiff rent in a on a vaca v. *Roe*,

26. See *Tucker v*

27. In judgment must be the rule Car. 2. 1

Where *elegit*, an the award return, i wards re pel the pl sion, at t *Casseldin*

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ERROR.

ERROR.

See Costs, 15.

1. If a defendant brings a writ of error and puts in sham bail, the plaintiff may treat them as a nullity, and issue execution. *Sutcliffe v. Eldred*, 184

2. If a plaintiff in error does not deliver his paper books in due time, and the defendant in error delivers them all, the latter is entitled to judgment. *Best v. Prior*, 189

3. An infant plaintiff suing by *prochein amy* was nonsuited, and then sued out a writ of error, but allowed the return-day to pass without taking any steps towards the prosecution of it. The defendant then issued execution against him for the costs of the nonsuit:—*Held*, that the execution was regular, though the writ of error was nonprossed; and that it was the plaintiff's duty to have prosecuted it, and not have allowed it to expire. *Quære*, whether an infant plaintiff, being nonsuited, is liable to be taken in execution for the costs of the nonsuit? *Dow v. Clark*, 302

4. Where a defendant gives a *cognovit*, and expressly agrees not to bring a writ of error, but notwithstanding does so, the allowance of such writ of error is no *supersedeas*, and will not prevent the plaintiff from charging him in execution.

Semble, that there is a distinction between a release of errors and an agreement not to bring a writ of error. *Best v. Gompertz*, 395

5. A notice of the allowance of a writ of error in an action of slander, stating the grounds of error to be, that the declaration and every count thereof is bad, the words not being actionable without special damage, and the innuendoes bad in law, sufficiently complies with 9 *Reg. Gen. H. T. 4 Will. 4. Robinson v. Day*, 501

EXCHEQUER CHAMBER. 859

Reg. Gen. H. 4 W. 4.

Writ of error no *supersedeas* till service with points to be argued. *Reg. 9*, 306

Execution if points frivolous. *Ibid.*

No rule to certify and transcribe. *Reg. 10*, *Ibid.*

Diminution, assignment of error, *sci. fa. quare execut. non*, rule for, unnecessary. *Reg. 11*, *Ibid.*

Proceedings in error, delivery of. *Reg. 12*, 307

No *sci. fa. ad. audiendum errores*, where twenty days expire after the 10th of Aug. *Reg. 13*, *Ibid.*

Further time allowed. *Ibid.*

Not to apply to error in fines, &c. *Ibid.*

Setting down case for argument. *Reg. 14*, *Ibid.*

Error books, delivery of. *Reg. 15*, *Ibid.*

Proceedings in error not entered before argument. *Reg. 16*, 308

ESTOPPEL.

See Insolvent, 2—Payment into Court, 5.

EVIDENCE.

See Account Stated, 1—*Reg. Gen. H. 4 Will. 4, r. 20*, 308.

Upon a plea in abatement of pendency of another action in another Court for the same cause, concluding with a *prout patet per recordum*, it is sufficient to satisfy the plea if a record of a writ is produced. *Kerby v. Siggers*, 596

EXAMINATION OF WITNESS.

See Cross-Examination, 1.

EXCHEQUER CHAMBER.

See *Reg. Gen. p. 138*.

EXCHEQUER SIDE CLERKS.

By the act of 11 *Geo. 4 & 1 Will. 4, c. 70, s. 10*, which opened the Court



EXTORTION.

mages for a libel against the proprietor of a newspaper, is not entitled to an extent against the principal and sureties in the recognizance, given by them to secure the payment of penalties, under the 11 *Geo. 4 & 1 Will. 4*, c. 73, s. 3, merely by getting a return of *nulla bona* to a *fi. fa.* issued against the principal; but he must convince the Court, by affidavit, that every exertion has been made to obtain satisfaction from the defendant. *Bennett v. Thompson*, 137

2. The Court refused to allow a writ of immediate extent to be antedated. *Rex v. Maberley*, 383

EXTORTION.

See LORDS' ACT, 1.

FALSE RETURN.

See STAYING PROCEEDINGS, 5.

FELONY.

In order to entitle a defendant, on a charge of felony, to be bailed before a magistrate in the country, it is not necessary to produce an affidavit of poverty, if it appears from the other affidavits in the case, that he is in an humble situation of life. *Rex Booker*, 446

FILING OF AFFIDAVIT.

See AFFIDAVIT, 3, 7.

FINES AND RECOVERIES.

See REG. GEN. M. 4 W. 4, 769; *H.* 4 W. 4, 789; *T.* 4 W. 4, 834.

FOREIGN WITNESS.

Since the 1 *Will.* 4, c. 22, it is discretionary with the Court whether they will allow the expenses of foreign witnesses brought over for the purposes of a cause, or only the costs of a commission. *M'Alpine v. Coles*, 290

GAME ACT.

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FRAUD.

See APPEARANCE, 1—*ATTORNEY*, 23
—*DISCONTINUANCE*, 1—*ERROR*, 4
—*INSOLVENT*, 1—*LIEN*, 1—*SHERIFF*, 1, 6—*STAYING PROCEEDINGS*, 2—*WAIVER*, 4.

FRAUDS (STATUTE OF).

A guarantie in these terms—"As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date"—is void by the Statute of Frauds. *James v. Williams*, 481

FRIVOLOUS DEMURRER.

1. A plea having been demurred to, because it was dated 1832, instead of 1833; the Court ordered the demurrer to be set aside with costs. *Neal v. Richardson*, 89

2. The Court refused to set aside a demurrer under the late rule, as being frivolous, the cause of demurrer being, that, in debt on a promissory note, it did not appear that the words "value received" were in the note. *Creswell v. Crisp*, 635

GAME ACT.

In a conviction for a trespass in the day-time under the 1 & 2 *Will.* 4, c. 32, s. 30, the Game Act, the words "enter and be" constitute only one offence.

In a conviction under the same section of the same act, the place of committing the trespass may be described as "certain land," without giving it a name, or setting it out with abutments.

As, by section 45 of that act, the conviction itself cannot be removed out of the inferior court, a verified copy may be used, to ascertain whether the conviction is valid. *Rex v. Mellor*, 173



INSOLVENT.

INJUNCTION.

See DECLARATION, 4.

INQUIRY (WRIT OF).

1. A defendant, who is under terms to take short notice of trial, is not bound to take short notice of inquiry.

A defendant, to whom an irregular notice of inquiry is given, ought to return it forthwith, and state what objection he has to it. Where a notice of inquiry was given, with eight days only instead of fourteen, and the defendant, instead of returning it, merely gave notice, after the lapse of six days, that he intended to apply to set it aside, without stating the objection, the Court, on making the rule absolute for setting aside the inquiry, refused costs. *Stevens v. Pell*, 355

2. Notice of a writ of inquiry was allowed to be served by sticking it up in the office, and leaving it at the defendant's last place of abode, though neither the process nor notice of declaration had been personally served. *Watson v. Delcroix*, 393

3. Where a plaintiff has obtained a judgment *non obstante veredicto*, he may execute a writ of inquiry to assess his damages, without leave of the Court. *Shephard v. Halls*, 453

4. Upon moving for a new trial of an inquiry of damages under a judgment upon demurrer, it is sufficient to produce the under-sheriff's notes verified by affidavit. *Stevens v. Pell*, 629.

INSOLVENT.

See ACCOUNT STATED, 2—BANKRUPT, 2—CROWN DEBTOR, 1—LIEN, 1—LORDS' ACT, 2—NOLLE PROSEQUI, 1—PLEA, 5—SECURITY FOR COSTS, 7.

1. An attorney who held a *cognovit* for a debt, agreed with the debtor, who was about to take the benefit of the Insolvent Act, and for whom he prepared the schedule, and acted as

INTERPLEADER.

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his attorney in obtaining his discharge, that the debt should be omitted out of the schedule, and that the *cognovit* should continue in force, notwithstanding his discharge. The insolvent obtained his discharge, and the attorney having issued execution on this *cognovit*, the Court set it aside. *Tabram v. Freeman*, 375

2. If a defendant gives a bill of exchange for a debt, from which he has been discharged by the Insolvent Act, and an action is brought on that bill, he must plead his discharge; and if he gives a warrant of attorney to secure the payment, the Court will not set it aside. *Philpot v. Aslett*, 669

INSTALMENT.

See EXECUTION, 2.

INTENTION.

See ADMINISTRATOR, 1.

INTERLOCUTORY COSTS.

See COSTS IN THE CAUSE, 2.

INTERLOCUTORY JUDGMENT.

Interlocutory judgment cannot be set aside because the notice of declaration is irregular.

Where a rule is drawn up for setting aside the judgment for irregularity, an objection that it was signed against good faith cannot be entertained, (though the rule was moved on that ground), that not being an irregularity. *Smith v. Clarke*, 218

INTERPLEADER.

See LANDLORD AND TENANT, 2—STATING PROCEEDINGS, 2.

1. A sheriff, who applies to the Court for relief under the Interpleader Act, must come as soon as possible. Where goods were taken in execution by a sheriff, and a claim being made to them, the sheriff was prevented from applying by a rule obtained by the defendant in the action

cumstance to be accounted for, the sheriff must make a special affidavit stating the facts; and no supplemental affidavit will be allowed. *Ibid.*

Semble, that the sheriff applying under this act ought to deny collusion. *Cook v. Allen*, 11

2. Where the sheriff applies to the Court for a rule under the Interpleader Act, cause cannot be shewn at Chambers. *Shaw v. Roberts*, 25

3. When the sheriff applies to the Court for protection under the Interpleader Act, no one has a right to be heard against the rule, unless he is called upon by the rule, though he is in fact a claimant; and if he is called on in one character he cannot appear in another.

Where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the Court will make the sheriff pay the costs of appearing.

Where the rule called upon assignees of a bankrupt, who had made a claim under the *stat* of bankruptcy, but which was afterwards superseded, the Court refused to make the sheriff pay the costs of the assignees' appearance. *Clarke v. Lord*, 55

4. Where application is made by the sheriff for relief under the Interpleader Act, the Court will not try

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7. Before Court unc is bound t the claims he brings consequer ly bad in compel hi v. *Hinz*

8. In c interfere i in favour claim to t made. *I*

9. Whe rection of pleader A is liable fi

A party by motion plication t what the not entitle the oppos confines costs. *E*

10. W on behalf by the sh a rule bei terpleader to shew c

the sheriff, the latter brought the landlord, with other claimants, into Court under the Interpleader Act; the Court ordered the sheriff to pay the rent, upon the landlord's giving security, and also to pay his costs:—*Held*, that the sheriff was liable to pay the expense of the security. *Clark v. Lord*, 227

12. Where an application is made to the Court by the sheriff under the Interpleader Act, the Court cannot try the right of the different claimants upon affidavit, but must direct an issue.

The circumstance of the goods seized being in the possession of a stranger and not of the defendant against whom the execution is issued, does not prevent the sheriff from applying under the act. *Allen v. Gibson*, 292

13. If a claim to goods seized by a sheriff is made by the defendant on behalf of another, which does not appear to be well founded, the Court will make him pay the costs of the sheriff's application under the Interpleader Act. *Lewis v. Eicke*, 336

14. The Court will not give relief to the sheriff under the Interpleader Act, unless an actual claim appears to have been made. Giving notice of a *fiat* in bankruptcy having issued is not equivalent to a claim by the assignees to the goods sold. *Bentley v. Hook*, 339

15. If the sheriff, having seized goods in execution, which are claimed by another party, delivers up part of the goods to the claimant, he thereby precludes himself from taking advantage of the Interpleader Act. *Braine v. Hunt*, 391

16. Where the sheriff applies for relief under the Interpleader Act, he need not in the affidavit in support of the application deny collusion with the claimants.

Where an execution creditor does

not appear on being served with the sheriff's rule, the Court cannot bar his claim. *Donniger v. Hinzman*, 424

17. Where a sheriff has seized goods under a *fi. fa.*, and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the 1 & 2 Will. 4, c. 58, s. 6. *Levy v. Champneys*, 454

18. The sheriff need not deny collusion, in order to obtain relief under the Interpleader Act. *Dobbins v. Green*, 509

19. The Court cannot give relief under the Interpleader Act to stakeholders who are only *threatened* with proceedings; an action must be brought, and the plaintiff declare, before the Court can interfere.

A stakeholder acting with good faith is entitled to his costs of coming to the Court out of the fund in dispute, which are ultimately paid by the unsuccessful party. *Parker v. Linnett*, 562

20. Where the sheriff obtains a rule for relief under the Interpleader Act, the claimants may appear without taking office copies of the affidavits on which the rule was obtained. *Mason v. Redshaw*, 595

21. The sheriff, in applying for relief under the Interpleader Act, should come promptly, but a late application will, under special circumstances, be allowed.

Where there was great delay on the part of the sheriff in applying to the Court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claims, the Court refused to make the latter pay costs. *Dixon v. Ensell*, 621

22. Where the sheriff seized goods in execution which were under a distress for rent due to the landlord, the Court refused to grant him relief un-



tion, and evidence to contradict them, which would be good under the general issue, ought not to be admitted. *Stephens v. Tell*, 629

JUDGMENT NON OBSTANTE VEREDICTO.

See COSTS, 12—INQUIRY (WRIT OF) 3.

JUDGMENT AS IN CASE OF A NONSUIT.

See COSTS OF THE DAY, 1, 2, 3—EXECUTORS, 1, 3, 4—PEREMPTORY UNDERTAKING, 2—SERVICE OF RULE, 6—WRIT OF TRIAL, 2, 5, 6, 7.

1. Where notice of trial was given for the second sitting in the term, issue having been joined in the term, and the plaintiff gave notice of countermand:—*Held*, that the defendant could not move for judgment as in case of a nonsuit, the same term. *Isaac v. Goodman*, 34

2. If, after a motion for the costs of the day for not proceeding to trial, the plaintiff suffers another term to elapse without giving notice of trial, that is a new default which entitles the defendant to move in the next term for judgment as in case of a nonsuit. *Dyke v. Edwards*, 53

3. Upon a rule for judgment as in case of a nonsuit, the plaintiff must shew some excuse, and the defendant is not obliged to accept a peremptory undertaking. *Nicholl v. Collingwood*, 60

4. Where the plaintiff makes default in not proceeding to trial at the assizes pursuant to his notice, and the defendant in the next term, without moving for judgment as in case of a nonsuit, merely applies for costs for not proceeding to trial, and the plaintiff again makes default by not giving notice of trial for the next assizes:—*semble*, that the defendant is not entitled to move for judgment as in case of a nonsuit. *Moseley v. Clark*, 66

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5. Where a defendant took out a summons for putting off a trial at the assizes so late before the commission day that the plaintiff thought he might be put to inconvenience in getting ready for trial if the order was refused, and therefore countermanded:—*Held*, that the defendant could not move for judgment as in case of a nonsuit as upon a default of the plaintiff. *Rendell v. Bailey*, 113

6. Issue joined in *Hilary* Term, in time for a trial that term, but the plaintiff did not proceed:—*Held*, that the defendant was entitled to move for judgment as in case of a nonsuit in *Trinity* Term. *Anonymous*, 122

7. Where a defendant is entitled to judgment as in case of a nonsuit, for not giving notice of trial, he is not deprived of his right by the plaintiff giving notice before the motion is made. *Smedley v. Christie*, 152

8. Where a plaintiff has once taken his cause down to the assizes, and it has been made a *remanet*, the defendant cannot obtain judgment as in case of a nonsuit, although the plaintiff may have given a subsequent notice of trial, on which he has taken no steps. *Gilbert v. Kirkland*, 153

9. If notice of trial be countermanded at the request of the defendant, he cannot obtain judgment as in case of a nonsuit, on the ground of not proceeding to trial pursuant to notice. *Jenkins v. Charity*, 197

10. Judgment as in case of a nonsuit cannot be moved for in the term for which notice of trial had been given. *Preedy v. Macfarlane*, 216

11. A plaintiff who was under a peremptory undertaking to pay, but was prevented attending in person to pay, by being arrested, was allowed to set aside the peremptory rule for judgment as in case of a nonsuit, on payment of costs. *Pitt v. Evans*, 226

12. Issue was joined in *Trinity* Term, and notice of trial given for

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JUDGE'S ORDER.

tained in vacation, it cannot be made a rule of Court till the following term. *The King v. Price*, 233

2. If a defendant in an action of replevin, which is made a special jury cause, withdraws his avowries, and the Judge directs him to pay "all costs," that will not include the costs of the special jury. *Bell v. Tainthorp*, 518

JUDGE'S POWER.

A Judge at chambers, who stays proceedings on payment of debt and costs, cannot, without the plaintiff's consent, allow the defendant longer time for the payment than he would be entitled to by law. *Kirby v. Ellison*, 219

JUDGMENT RECOVERED.

See REG. GEN. H. 4 WILL. 4, p. 305, r. 8.

JURAT.

See AFFIDAVIT, 2, 9—BAIL, 18.

JUROR.

By the operation of 6 Geo. 4, c. 50, s. 1, upon the letters patent appointing the Postmaster-General, all deputies and officers appointed by him are exempted from serving as jurors. *Ex parte Atkinson*, 773

JUSTIFICATIONS.

See COSTS, 24.

KING'S BENCH (JURISDICTION OF).

See MAGISTRATES' DISCRETION, 1.

KING'S SERVANT.

See SECURITY FOR COSTS, 6.

LACHES.

See AFFIDAVIT OF DEBT, 7—AMENDMENT, 2—ARBITRATION, 6—AWARD, 3—BAIL, 16—CAPIAS, 7—DISTRINGAS, 18—EJECTMENT, 5,

LACHES.

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9—INQUIRY (WRIT OF), 1—INTERPLEADER, 2—PRISONER, 3—REASONABLE TIME, 1—STAYING PROCEEDINGS, 4, 8—SUPERSEDEAS, 2—TAXATION, 3—VARIANCE, 3—VENUE, 7—WRIT OF INQUIRY, 1.

1. Where judgment was irregularly signed, no demand of plea having been made, though the defendant had entered an appearance, but the plaintiff being ignorant of it, had entered an appearance for him, and gave notice of a declaration being filed, which the defendant did not object to, and the plaintiff gave notice to tax, and issued execution, and then the defendant took out a summons to set aside the judgment:—the Court, without entering into the question whether a Judge at Chambers has power to set aside a judgment—*Held*, that the defendant had precluded himself by his laches from applying to the Court, and that he should have given notice that the proceedings were irregular, and not have allowed the plaintiff to take fresh steps, as if the proceedings had been correct. *Rutty v. Arthur*, 36

2. Where there is an irregularity in any proceeding had in vacation, and there is time in the course of that vacation to apply to a Judge at Chambers, it is imperative upon the party complaining to do so; and he cannot wait to move to set aside the proceeding till the first four days of next term, though there has been no intermediate step taken. *Cox v. Tullock*, 47

3. Where a defendant moved to set aside proceedings to outlawry for irregularity, the last of the proclamations being in *August*, and the motion being made at the commencement of *Michaelmas Term*:—*Held*, too late, it not appearing that the defendant was not apprized of the first commencement of the proceedings, but on the contrary there being rea-

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LODGER.

LODGER.

See *DISTRINGAS*, 6.

LORDS' ACT.

See *LACHES*, 4.

1. The Court will not interfere under the 32 *Geo.* 2, c. 28, s. 11, to relieve a debtor from alleged extortion, unless a *prima facie* case of extortion is made out on the part of the petitioner. *Ex parte Tighe*, 148

2. A prisoner, who has been brought up under the compulsory clauses of the Lords' Act, and has had his sixty days allowed, is not prevented from taking the benefit of the Insolvent Act during that time, and assigning his effects to an assignee; and that is a good excuse for not filing his schedule under the Lords' Act; and, if he is brought up again, the Court will give him time till he has been discharged by the Insolvent Act. *Perrott v. Deane*, 284

3. The motion for bringing up a prisoner under the compulsory clauses of the Lords' Act, must be supported by an express affidavit that all the creditors have been served with notice.

Quære, whether the Lords' Act extends to the case of a prisoner who is in execution for debts under 300*l.*, and also for debts above 300*l.*? *Grove v. Parker*, 626

4. Under the compulsory clauses of the Lords' Act, the twenty days' notice must expire before the first day of the term in which the defendant is to appear, or at any rate before taking out the rule for his appearance. *Hayward v. Priest*, 737

MAGISTRATES' DISCRETION.

The Court of *King's Bench* cannot interfere to reduce the amount of security which the magistrates require a defendant to give for the preservation of the peace. *Rex v. Holloway*, 525

MASTER'S DISCRETION. 871

MANDAMUS.

See *WITNESS*, 1.

MARSHAL.

Where, in consequence of the death of the Marshal of the *King's Bench* Prison, there was no one at the gaol who would receive a prisoner charged in execution, the Court enlarged the time. *Harris v. Davies*, 624

MASTER'S DISCRETION.

See *ATTACHMENT*, 8—*ATTORNEY AND AGENT*, 2—*COSTS*, 6, 7—*TAXATION*, 5, 8, 9.

1. It is a question for the discretion of the Master, whether a witness ought to be allowed for the whole time of his attendance at the assizes, or only a portion of it; but, where the Master has decided upon it, the Court will not review his decision. *Piatt v. Greene*, 216

2. The Master, to whom a bill of costs is referred for taxation, has no power to inquire into the fact whether the business charged for was agreed to be done for costs out of pocket. *Evans v. Taylor*, 349

3. Where there are issues of fact, and also issues of law, occasioned by a demurrer, but the pleadings demurred to being afterwards amended by leave, upon payment of costs, all the issues were made issues of fact:—*Held*, that the Master was right in not allowing so much of the briefs and paper books for arguing the demurrer as related to the issues of fact.

In an action on an attorney's bill, an order for better particulars was obtained on payment of costs:—*Held*, that a charge for drawing the bill, as part of the costs, was properly disallowed by the Master. *Jones v. Roberts*, 374

4. In taxing an attorney's bill, if a full sixth is taken off, the attorney is always liable to pay the costs of taxation; if less than a sixth is taken

872 MASTER'S DISCRETION.

off, it is in the discretion of the Court to make him pay the costs or not; and, therefore, where a large sum is taken off, being within a trifle of a sixth:—*Held*, that the Master was justified in charging the attorney with the costs of taxation. *Baker v. Mills*, 382

5. A plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and may therefore have the costs of their attendance previous to the trial. *Cosgrave v. Evans*, 443

6. Where an application was made against the deputy constable or bodar of *Dovor Castle*, on the ground of his having taken larger fees for executing process than those allowed by the 23 *Hen.* 6, c. 9, but only the usual fees had been allowed by the Master, the court refused to interfere, but left the party to his remedy by action. *Primrose v. Bradley*, 662

MEMBERS OF PARLIAMENT.

Where a person having privilege of Parliament has been sued by bill and summons before the Uniformity of Process Act passed, and after the commencement of the action he loses his privilege, the process should be continued by *distringas*, treating him as an M. P., in order to avoid the Statute of Limitations. *Taylor v. Duncombe*, 401

MERITS.

See ABSENCE OF WITNESS, 1—BAIL-BOND, 3—INTERPLEADER, 4—NON PROS., 1—NOTICE OF TRIAL, 3—SHERIFF, 6—STAYING PROCEEDINGS, 3, 5.

MESNE PROFITS.

See COSTS, 14.

MISDESCRIPTION.

If the form of action is misdescribed at the commencement of a declaration, it is an irregularity, and not a

NEW TRIAL.

ground of special demurrer. *Marshall v. Thomas*, 208

MISDIRECTION.

See NEW TRIAL, 5.

MISNOMER.

See AFFIDAVIT, 5—DISTRINGAS, 17.

A party arrested on an attachment for disobedience to a rule of Court, in not paying costs pursuant to a Master's *allocatur*, was discharged, it appearing that *Calver* was written instead of *Calvert*, and the name of the Master to the *allocatur* was *Day* instead of *Dax*. *Smith v. Calvert*, 276

MISREPRESENTATION.

See WAIVER, 4.

MORAVIAN.

See CORONER'S INQUISITION, 1.

NEGLIGENCE.

See ATTORNEY, 1—STAYING PROCEEDINGS, 1—TAXATION, 9.

NEW TRIAL.

See COSTS, 6, 20—COSTS OF THE DAY, 2—INQUIRY (WRIT OF), 4—SCIRE FACIAS, 7—WRIT OF TRIAL, 4, 10, 11, 12, 14.

1. A rule for a new trial having been moved for by mistake in a wrong Court, and the mistake not having been discovered till after the first four days of the term had elapsed, the Court, under the circumstances, allowed the motion to stand good as of the latter Court. *Piggott v. Kemp*, 20

2. After a motion for a new trial has been granted on certain points, it is irregular to make another motion upon another point respecting the same cause, to come on at the same time. *Robertson v. Barker*, 39

3. Where a plaintiff gave notice that he should take the cause down to trial as an undefended cause, and

NEW TRIAL.

when it was called on the defendant's counsel said it was defended, whereupon it was not tried; but the plaintiff again took the record down and got the cause tried as undefended, without any new notice or setting it down in the paper, the Court granted a new trial, without payment of costs. *Sprigge v. Rutherford*, 429

4. Where a rule *nisi* for a new trial is granted on the terms of bringing the amount of the verdict into Court, the money must be brought in before the rule *nisi* is drawn up. *Clare v. Fiestel*, 617

5. In an action for penalties for keeping an unlicensed house for music and dancing, &c., and the evidence for the plaintiff was clear and positive, and might, if it was false, have been answered by evidence on the other side, the jury requested to have the act of Parliament handed up to them, with which they retired to consider their verdict, and found in favour of the defendant: the Court, under these circumstances, granted a rule for a new trial, considering that the jury must have put a misconstruction upon the act, and that it was equivalent, therefore, to a misdirection, on which ground alone a new trial, in such an action, is usually granted. *Gregory v. Tuffs*, 711

NEWSPAPER PROPRIETOR.

See EXTENT, 1.

NISI PRIUS.

See FORM OF RECORD, 328—PRIVILEGE FROM ARREST.

NOLLE PROSEQUI.

1. Where an action was brought against several defendants, and a verdict taken against all, though it had been agreed that no evidence should be given against one of them, the Court ordered a *nolle prosequi* to be entered as to him, though the assignee

NOTICE OF MOTION. 873

of the plaintiff, who had since become an insolvent, objected. *Bloomfield v. Blake*, 237

2. The tenant in a writ of intrusion is not entitled to costs where the demandant enters a *nolle prosequi*. *Williams dem., Harris ten.* 819

NON EST FACTUM (PLEA OF).

See ANNUITY, 1.

NONPROS.

See ERROR, 3—SECOND ACTION, 1.

1. The affidavit in support of a motion to set aside a judgment of *nonpros.* should state either that there is a good cause of action on the merits, or that there is a present cause of action. *Cortessos v. Home*, 134

2. In an action against several defendants, a judgment of *nonpros* cannot be signed until all have appeared. 507

NONSUIT.

See ERROR, 1—VARIANCE, 1.

NOTICE.

See LIEN, 1.

NOTICE OF ACTION.

An officer of the *Southmark* Court of Requests' Act (46 *Geo.* 3, c. lxxxvii.) is entitled to fourteen days' notice of action, under s. 21, for a trespass committed in the *bond fide* pursuit of a person named in his warrant, although the party was not in the *locus in quo*, and he had no reasonable grounds for supposing she was. *Cook v. Clark*, 732

NOTICE OF DECLARATION.

See INTERLOCUTORY JUDGMENT, 1.

NOTICE OF DISHONOUR.

See INDORSER (ACTION AGAINST).

NOTICE OF MOTION.

See STAYING PROCEEDINGS, 10.

NOTICE OF TRIAL.

See INQUIRY (WRIT OF), 1—JUDGMENT AS IN CASE OF A NONSUIT, 1—NEW TRIAL, 3—SUPERSEDEAS, 3.

1. A continuance of notice of trial must be given two days before the expiration of the original notice: and where the notice of trial was for *Monday*, and the notice of continuance was given on *Saturday*:—*Held*, bad, for *Sunday* was no day for that purpose. *Wardle v. Ackland*, 28

2. Where, in a country cause, a defendant undertakes to accept short notice of trial, he is entitled to four days' notice before the commission day, although, from the length of the pleadings, issue is not joined soon enough to admit of so many days. The plaintiff having obtained a verdict, with only three days' notice, the defendant being an executor, the Court granted a new trial without an affidavit of merits. *Lawson v. Robinson*, 69

3. Where a verdict was obtained in the absence of defendant, on account of no notice of trial being given, the Court set the verdict aside, though the defendant did not swear positively to a good defence on the merits. *Williams v. Williams*, 350

4. A continuance of notice of trial on *Friday* for *Monday* is sufficient. *Stewart v. Abraham*, 709

NULLITY.

See ADMINISTRATORS, 2—BAIL, 1—PLEA, 1—PRISONER, 3.

1. Where a declaration was delivered in the name of a person as the attorney, but who in fact was not so, it was held that the defendant could not treat the declaration as a nullity, and sign judgment. *Bayley v. Thomson*, 655

2. A motion to set aside an interlocutory judgment for irregularity, which was signed because a plea was pleaded in the name of a person who was not an attorney:—*Held*, in time

PAUPER.

on the 23rd, the day of executing the writ of inquiry, though the notice of executing the inquiry was served on the 15th of *May*.

A plaintiff cannot treat such a plea as a nullity. *Hill v. Mills*, 696

OCCUPATION.

See ACCOUNT STATED, 2.

ORDER OF REMOVAL.

An order of justices under the 35 *Geo. 3*, c. 101, sufficiently states the chargeability of a woman, by stating her to be "a widow now pregnant." *Pattrington v. Cottingham*, 473

OUTLAWRY.

See DISTINGUISH, 7—LACHES, 3.

If a defendant is discharged from an outlawry conditionally on his suffering eight months' imprisonment, the Court will not reverse the outlawry until the eight months' imprisonment have been suffered. *Dixon v. Baker*, 517

PALACE COURT.

See COSTS, 11.

PAPER BOOKS.

It is too late to deliver paper books on *Saturday* evening, for an argument on *Monday* morning. *Darker v. Darker*, 88

PARTICULARS.

See VARIANCE, 1.

PARTIES (DESCRIPTION OF).

See REG. GEN. H. 4 W. 4, r. 21, 321

PARTNERS.

See STAY OF PROCEEDINGS, 6.

PAUPER.

See FELONY—ORDER OF REMOVAL, 1—SECURITY FOR COSTS, 5.

1. A rule requiring a pauper to pay the costs of the day, for not proceeding to trial, is *nisi* in the first instance. *Doe d. Lindsey v. Edwards*, 468

2. If a pauper withdraws his record because he is not prepared with

a certain necessary document at the assizes, the Court will compel him to pay the costs of the day. *Doe d. Lindsey v. Edwards*, 471

PAYMENT.

See APPROPRIATION OF PAYMENT, 1, 2,

PAYMENT INTO COURT.

See COSTS, 19—JUDGMENT AS IN CASE OF A NONSUIT, 15—REG. GEN. H. T. 4 W. 4, rr. 17, 18, 19, p. 320-1—TENDER, 1.

1. Where a motion is to be made to take out money paid into Court by a defendant in lieu of bail, notice of the motion should be given to the solicitor of the Treasury.

Semble, that poundage cannot be claimed on money so paid in, where it is not sufficient to satisfy the amount of the plaintiff's verdict. *Haines v. Nairn*, 43

2. Where a defendant took out a summons to stay proceedings on payment of a certain sum with costs, and the plaintiff refused to accept it, but afterwards, when the money was paid in under a rule of Court, took it out and discontinued:—*Held*, that the plaintiff was only entitled to costs up to the time of the first offer, though he stated as a reason for not proceeding, that he could not find a material witness. *Hale v. Baker*, 125

3. Where money is paid into Court under the 7 & 8 Geo. 4, c. 71, in lieu of bail, and issue is joined, applications to take it out must be made before issue joined. *Hanwell v. Mure*, 155

4. In an action of debt the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into Court: judgment having been on that account signed as for want of a plea, the Court set aside the judgment for irregularity. *Chapman v. Hicks*, 641

5. In an action of *indebitatus assumpsit* against several, on an alleged joint contract, if money is paid into Court generally, the defendants are estopped from proving that some of them were not parties to the contract. *Ravenscroft v. Wise*, 676

6. Where a whole count applies to a demand for unliquidated damages, money cannot be paid into Court on a part of it. *Hodges v. Lord Litchfield*, 741

7. Money may be paid into Court on one of several breaches of a covenant contained in a lease set forth in a declaration, if the plaintiff's particular specifies the sum he claims on that breach. *Smith v. King*, 750

8. The plaintiff has a right to the costs of applying to take money out of Court, which has been paid in lieu of bail. *Freeman v. Paganini*, 776

PEER.

See SECURITY FOR COSTS, 6, 9.

PENAL ACTION.

See COMPOUNDING PENAL ACTION, 1.

PENDENCY OF SUIT.

See EVIDENCE, 1.

PEREMPTORY UNDERTAKING.

See JUDGMENT AS IN CASE OF A NON-SUIT, 3, 13, 21.

1. In support of a rule to enlarge a peremptory undertaking, where the plaintiff has made only one default, in consequence of the absence of a material witness, the affidavit need not state the name of that witness. *Montfort v. Bond*, 403

2. Where a plaintiff has given a peremptory undertaking (but not by rule), the rule for judgment as in case of a nonsuit for not fulfilling that undertaking is *nisi* in the first instance. *Vokins v. Snell*, 411

PERSON (DEFENCE IN).

See DEFENCE IN PERSON, 1.

PLEA.

See AMENDMENT, 8—NULLITY, 1.

1. A plea, being delivered after nine o'clock in the evening, cannot be treated as a nullity; and a judgment signed on that ground, and no notice having been given of the objection to the defendant, was set aside. *Horsley v. Purdon*, 228

2. If a plaintiff gives a greater number of days for pleading than by the practice of the Court is required, the defendant is entitled to avail himself of that greater number. *Solomonson v. Parker*, 405

3. If the time for pleading does not expire until after the 10th of August, although it may be enlarged time, the defendant has still the same time for pleading as if the declaration had been filed or delivered on the 24th of October. *Wilson v. Bradslocke*, 416

4. A special plea of justification, besides the general issue, will not now be allowed, where the special matter may, by statute, be given in evidence under the latter plea. *Neale v. M'Kenzie*, 702

5. A plea of a discharge under the Insolvent Debtors' Act was held bad, because it did not admit the existence of the cause of action. *Gould v. Raspery*, 707

6. In plea of judgment recovered, number of roll stated in margin. 8
Reg. Gen. H. 4 W. 4, 305

PLEADING.

See ACCOUNT STATED, 3—COSTS, 10, 15—DECLARATION, 3—EJECTMENT, 2, 4—EVIDENCE, 1—GRATIS REJOINDER—NULLITY, 2—PLEA, 4—RULE TO PLEAD, 4—SET-OFF (PLEA OF), 1—VENUE, 13.

1. To debt on a recognizance of bail, the defendant having pleaded

that no *ca. sa.* issued, to which the plaintiff replied, that a *ca. sa.* did issue directed to the sheriffs of London, and the defendant rejoined that the original action was brought in *Middlesex*, and not in London, which the plaintiff denied in his surrejoinder, and concluded with a verification by the record:—*Held*, on special demurrer, that the conclusion was proper. *Darling v. Gurney*, 101

2. To a declaration on a bill of exchange with the common counts, the defendant pleaded that the bill of exchange in the first count mentioned was paid when due; and also, as to the first count, that he did not promise; and as to the other counts, that he put himself upon the country:—*Held*, that the plaintiff was justified in treating each as a separate plea, though the second was declared inadmissible by the new rules, and the last put nothing in issue; and that he was therefore justified in signing judgment, there being no signature to the pleas, or rule to plead double. *Hockley v. Sutton*, 700

Reg. Gen. H. 4 W. 4.

All pleadings are intitled of the day and year when pleaded, and so entered of record. *Reg. 1*, 313

No continuances to be entered.

Reg. 2, *Ibid.*

Not to affect the times of proceeding. *Ibid.*

Plea, puis darrein continuance, affidavit to verify. *Ibid.*

Several counts and pleas, where allowed. *Reg. 5*, 414

Examples in declarations. *Ibid.*

Contract with condition. *Ibid.*

Non-delivery of bill in payment. *Ibid.*

Not accepting and paying for goods. *Ibid.*

Bills and notes. *Ibid.*

Policies. 315

Premium. *Ibid.*

Charter-parties. *Ibid.*

Freight.	315
Demise, and use and occupation.	<i>Ibid.</i>
Misfeasance.	<i>Ibid.</i>
Nonfeasance.	<i>Ibid.</i>
Trespass.	<i>Ibid.</i>
<i>Indebitatus assumpsit.</i>	<i>Ibid.</i>
Account stated,	316
Several breaches.	<i>Ibid.</i>
Instances of pleas and avowries, &c.	<i>Ibid.</i>
Payment.	<i>Ibid.</i>
Accord and satisfaction—release.	<i>Ibid.</i>
Liability of third party.	<i>Ibid.</i>
Agreement to forbear in consideration of liability of third party.	<i>Ibid.</i>
<i>Lib. ten.</i> , easement, right of way, right of common, common of turbary and estovers.	<i>Ibid.</i>
Right of common.	317
Right of way.	<i>Ibid.</i>
Distress for rent and damage feasant.	<i>Ibid.</i>
Distress for rent.	<i>Ibid.</i>
The above cases instances only.	<i>Ibid.</i>
Violation of these rules, how taken advantage of.	<i>Reg. 6, Ibid.</i>
Costs of counts and pleas.	<i>Reg. 7, 318</i>
Special venue.	<i>Reg. 8, Ibid.</i>
Local description.	<i>Ibid.</i>
Commencement and conclusion of pleas, &c.	<i>Reg. 9, 319</i>
Commencement of plea.	<i>Reg. 10, Ibid.</i>
Second plea.	<i>Reg. 11, Ibid.</i>
Protestation.	<i>Reg. 12, Ibid.</i>
Traverses.	<i>Reg. 13, Ibid.</i>
Opposite party may plead over.	<i>Ibid.</i>
Form of demurrer.	<i>Ibid.</i>
Joinder in demurrer.	<i>Ibid.</i>
Commencement of declaration after plea of nonjoinder.	<i>Reg. 20, 321</i>
Character of assignees, &c. to be taken as admitted unless specially denied.	<i>Reg. 21. Ibid.</i>

PLEADINGS IN PARTICULAR ACTIONS.

<i>Assumpsit.</i>	
Effect of non-assumpsit.	<i>Reg. 1, 322</i>
<i>Instances.</i>	
Warranty.	<i>Ibid.</i>
Policy.	<i>Ibid.</i>
Carriers and bailees.	<i>Ibid.</i>
Agents.	<i>Ibid.</i>
Goods sold.	<i>Ibid.</i>
Money had.	<i>Ibid.</i>
Bills and notes no general issue,	323
In assumpsit, matters in confession and avoidance to be pleaded specially.	<i>Ibid.</i>
Statement of interest of assured.	<i>Ibid.</i>
<i>In Covenant and Debt.</i>	
<i>Non est factum.</i>	<i>Ibid.</i>
<i>Nil debet.</i>	<i>Ibid.</i>
General issue in debt.	324
Matters in confession and avoidance pleaded specially.	<i>Ibid.</i>
Pleas in other actions.	<i>Ibid.</i>
<i>Detinue.</i>	
<i>Non detinet.</i>	<i>Ibid.</i>
<i>In case.</i>	
Effect of not guilty.	<i>Ibid.</i>
Other pleas.	<i>Ibid.</i>
<i>Instances.</i>	
Nuisance.	<i>Ibid.</i>
Right of way.	325
Trover.	<i>Ibid.</i>
Slander.	<i>Ibid.</i>
Escape.	<i>Ibid.</i>
Carriers.	<i>Ibid.</i>
Matters in confession and avoidance pleaded specially.	<i>Ibid.</i>
<i>In Trespass.</i>	
Abuttals in declaration.	<i>Ibid.</i>
Effect of not guilty in trespass <i>qu. cl. fr.</i>	<i>Ibid.</i>
In trespass <i>de bon. asp.</i>	326
Right of way.	<i>Ibid.</i>
Common of pasture.	<i>Ibid.</i>
Similar pleas.	<i>Ibid.</i>
Commencement of the rules.	<i>Ibid.</i>

POSSESSION (WRIT OF).

Where a sheriff's officer taking possession under a *hab. fac. pos.* is dispossessed before he delivers possession to the lessor of the plaintiff, it is necessary that it should appear that the persons dispossessing are acting in concert with the defendant, before a fresh writ can issue. *Doe d. Thompson v. Mirchouse*, 200

POSTMASTER-GENERAL.

See JUROR, 1.

POUNDAGE.

See PAYMENT INTO COURT, 1.

POVERTY.

See FELONY.

PRÆCIPE.

See CAPIAS, 13.

PREGNANCY.

See ORDER OF REMOVAL, 1.

PRESUMPTION.

See ORDER OF REMOVAL, 1.

PRINCIPAL AND SURETY.

See BAIL, 20—BAIL-BOND, 4—EXECUTION, 1.

PRISONER.

See BAIL, 8, 14—COGNOVIT, 1—FELONY—IRREGULARITY, 6—LORDS' ACT, 1—MARSHAL, 1—SUPERSEDEAS, 1, 2, 3, 4—VENUE, 5.

1. Where a defendant is detained in the custody of the warden on process issuing out of the *King's Bench*, the declaration should state him to be in the custody of the warden, and it is not necessary to bring him up by *hab. corp.* to charge him with a declaration. *Barnett v. Harris*, 186

2. Where a part of a debt has been levied, and the defendant is detained on a *hab. corp. ad satisfac.* for the residue, it is not necessary to refer on

the latter writ to the amount of the levy made.

Where 1 *Reg. Gen. H.* 2 *W.* 4, s. 5, as to the addition of deponents, need not be strictly complied with. *Green v. Foster*, 191

3. If a writ of execution, on which a defendant is charged in custody, is a nullity, the lapse of time does not waive his right to apply for his discharge. *Mortimer v. Piggott*, 615

A prisoner in the custody of the marshal, if detained on process from the *Common Pleas*, need not now be removed into the custody of the warden, in order to be charged with a declaration. *Millard v. Millman*, 723

PRIVILEGE FROM ARREST.

See UNIFORMITY OF PROCESS ACT, 3.

1. A practising barrister is privileged from arrest whilst he is on his return from Court. *Luntly v. Nathaniel*, 51

2. Where a party to a cause is arrested upon process out of another Court, while attending at *Nisi Prius* in expectation of its coming on, he must apply for relief to the Judge at *Nisi Prius*, or to the Court out of which the process issues, and not to the Court in which the cause is. *Pitt v. Evans*, 223

3. The privilege of freedom from arrest, which is allowed to ambassadors' servants, is the privilege not of the servant but of the ambassador; and, if the latter does not interfere, the Court will not grant relief to a defendant who has been arrested, unless he shews a clear case of service either as domestic servant or under a hiring. *Fisher v. Begrez*, 279

4. Where a defendant is discharged from lawful custody, he is entitled to no privilege from arrest *redeundo*. *Goodman v. London*, 504

PROCHEIN AMY.

See ERROR, 3.

REASONABLE TIME.

PRODUCTION OF DOCUMENT.

See COSTS, 16.

A party who holds an agreement of which there is only one part, is bound to give a copy to the other side without imposing any terms. An application for a copy of an agreement ought to be made to a Judge at chambers, and not to the full Court. *Read v. Coleman*, 354

PROHIBITION.

A defendant cited in the Ecclesiastical Court must appear before he can apply for a prohibition. *Ex parte Lam*, 528

PROSECUTOR.

The prosecutor has a right to remove his indictment at any time before trial, and the Court has no jurisdiction over the costs consequent on exercising that right. *Rex v. Pashman*, 529

PROUT PATET PER RECORDUM (ALLEGATION OF).

See EVIDENCE, 1.

PUIS DARREIN CONTINUANCE.

See PLEADING RULES, p. 313—RELEASE, 1.

PUTTING OFF ARGUMENT.

See SCIRE FACIAS, 7.

QUAKER.

See CORONER'S INQUISITION, 1.

QUI TAM.

See STAYING PROCEEDINGS, 6.

REASONABLE TIME.

See INDORSEMENT (ACTION AGAINST)—IRREGULARITY, 1—NULLITY, 2.

The rule that an application to set aside proceedings for irregularity must be made in a reasonable time applies as well to the case of a prisoner as to other persons. *Primrose v. Baddeley*, 350

REPLEVIN.

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RECORD (PASSING).

See 18 REG. GEN. H. 4 W. 4 (PRACTICE RULES), 308.

RECOVERIES AND FINES.

See REG. GEN. M. 4 W. 4, p. 769—H. 4 W. 4, p. 789.

RECORD (NISI PRIUS).

See FORM No. 2, p. 328.

REFERENCE.

See LIEN, 3.

RELATION.

See EXECUTION, 860—WARRANT OF ATTORNEY.

RELEASE.

1. Where an action was brought by two of four executors, for the balance of an account, and the other two executors released the action, which release was pleaded *puis darrein continuance*, the Court refused to set it aside. *Herbert v. Piggott*, 592

2. Where a release of a witness has been executed, and before it is delivered to him, the name of another witness is introduced, and the instrument re-executed, it is not necessary to have a fresh stamp.

Quære, whether one stamp is sufficient on a release of two witnesses? *Spicer v. Burgess*, 769

REMOVAL OF INDICTMENT.

See PROSECUTOR.

RENDER.

See BAIL-BOND, 2, 6—BANKRUPT, 3.

The time for rendering a bankrupt defendant in discharge of his bail will not be enlarged in the case of a London fiat. *Coombs v. Dod*, 766

RENT.

See ACCOUNT STATED, 2.

REPLEVIN.

See INDORSEMENT (ON PROCESS), 2.

The sureties in a replevin-bond are only liable for the value of the goods

seized and double costs; and if that value exceeds the amount of rent due, they will only be liable for the rent.
Hunt v. Round, 558

RESCUE.

See SHERIFF'S RETURN, 1.

RESIDENCE.

See CAPIAS, 2, 3, 4—SUMMONS, 2.

RETURN OF WRIT.

See SHERIFF, 5.

RULE.

See ATTACHMENT, 9—COSTS, 1, 22—
 RULE TO PLEAD, 4—SERVICE OF
 RULE, 1, 2, 3, 4, 5.

A party upon whom the rule does not call is not obliged to appear and shew cause, because he is served with the rule; and, if he does, the Court will not give him his costs of appearing.

Where a rule is enlarged from *Trinity* Term to *Michaelmas* Term, affidavits filed a week before the latter term are in time. *Johnson v. Marriott*, 343

RULE TO PLEAD.

1. Where the declaration and rule to plead were both in vacation, a judgment signed in the next term without a new rule to plead—*Held*, regular. *Mould v. Murphy*, 54

2. Where a declaration is amended, with liberty for the defendant to plead *de novo*, and the plaintiff merely adds more counts for the same cause of action, if the old pleas apply to the new declaration, the plaintiff cannot sign judgment as for want of a plea, without a rule to plead, or demand of plea. *Fagg v. Borsley*, 107

3. Where the declaration is delivered in the term, judgment may now be signed in the following term for want of a plea, without giving a rule to plead of the term of which the judgment is. *Pryer v. Smith*, 114

SCIRE FACIAS.

4. Rules to reply or to plead any subsequent pleading must be served.
Pound v. Lewis, 744

RULE TO REPLY, &c.

See RULE TO PLEAD, 4.

SCIRE FACIAS.

See DEMURRER, 1—EXECUTION, 5—
 PRISONER, 3.

1. The *sci. fa.* against bail need not be tested on the return day of the *ca. sa.* *Sandland v. Claridge*, 114

2. A *scire facias* served upon bail on the evening before the return day:—*Held*, regular. *Lewis v. Pine*, 133

3. Proceedings against bail are irregular, if the defendant has procured the *ca. sa.* against the principal to be returned *non est inventus*, knowing that the defendant is in custody of the sheriff, although by a different name. *Briggs v. Richardson*, 158

4. Judgment cannot be signed on a *sci. fa.* against bail resident out of the county of *Middlesex*, unless they have received notice of the proceedings, or attempts have been made to give such a notice. *Wimall v. Cook*, 173

5. Where a *sci. fa.* is unnecessarily sued out, but the defendant's attorney, on his behalf, proposes terms of compromise, on which the party for a time acts, the defendant cannot afterwards object to pay the costs of the *sci. fa.* *Brewster v. Meaks*, 612

6. If there is an objection to proceedings in *sci. fa.*, on the ground that the writ had not lain a sufficient number of days in the office, the defendant should not apply to set aside the writ, but the proceedings thereon. *Williams v. Brown*, 749

7. While a rule *nisi* was pending for a new trial in an action for invading the plaintiff's patent, the defendant sued out a *sci. fa.* for the purpose of trying the same right; but the Court would not defer the discussion of the

SEALING SUMMONS.

rule until a decision on the *sci. fa.* should be obtained. *Haworth v. Hardcastle*, 802

SEALING SUMMONS.

See SUMMONS, 6, 7.

SECOND ACTION.

See COSTS OF THE DAY, 2—**GRATIS REJOINDER.**

1. Where a plaintiff has been *non-prossed* in replevin, and he afterwards brings trespass for the same cause, the Court will set aside the proceedings in the second action on motion. *Liversedge v. Goode*, 140

2. Where a second action was brought for the same cause of action, whilst a former one was pending, the Court discharged a rule for staying the proceedings in the second action, upon the affidavit of the plaintiff disclaiming the act of his attorney in bringing the first action. *Souter v. Watts*, 263

SECOND EXECUTION.

See PRISONER, 2.

SECURITY FOR COSTS.

1. Where a plaintiff becomes bankrupt in the middle of a cause, the assignees, if they proceed with the action, must give security for all the costs. The defendant may apply for this security at any time before a fresh step in the cause is taken. *Mason v. Polhill*, 61

2. If a plaintiff, after leaving this country, commences an action, he will be compelled to find security for costs. *Wells v. Barton*, 160

3. The Court will not compel a plaintiff in a *qui tam* action to give security for costs, though he is sworn to be a pauper, and has a very great number of actions by the same attorney. *Gregory q. t. v. Elvidge*, 259

4. Where security for costs has been given, the defendant will not be

SERVICE (OF PROCESS). 881

entitled to fresh security if the sureties become insolvent. *Jones v. Jacobs*, 442

5. Where a plaintiff, suing *in forma pauperis*, will be absent from England eighteen months, the Court will compel him to give security for costs, or stay his proceedings until his return. *Foss v. Wagner*, 499

6. A commissioner of the *Ionian* Islands, filling his office out of this country, cannot be compelled to find security for costs when plaintiff. *Semble*, that the Court will not take judicial notice of the plaintiff being an *Irish* peer. *Lord Nugent v. Harcourt*, 578

7. If an insolvent debtor proceeds with an action after executing his assignment, although no assignees are appointed, the Court will compel him to find security for costs. *Doyle v. Anderson*, 596

8. A plaintiff cannot be required to give security for costs unless it appears that he is gone abroad for more than a mere temporary absence. *Taylor v. Fraser*, 622

9. Security for costs cannot be required from a peer, though residing abroad. *Earl Ferrars v. Robins*, 636

10. It is too late to apply for security for costs after judgment signed.

Unless a previous application is made, the costs of the rule will not be allowed. *Bohrs v. Sessions*, 710

SEPARATE DEFENCES.

See DEFENCES (SEPARATE), 1.

SERVICE (OF PROCESS).

See IRREGULARITY, 2.

1. Upon a motion to set aside the service of a summons, however positively the defendant and his witnesses may swear to negative the personal service; yet, if it is left in doubt by the affidavits on the other side, whether there was a sufficient service or



of costs, except those of the rule to rescind. *Cash v. Cock*, 3

SETTING ASIDE PROCEEDINGS.

1. The names of two defendants were inserted in the process, and after appearance by the defendants, the plaintiff declared against them separately. The Court set aside the declaration for irregularity. *Pepper v. Whalley*, 821

2. The plaintiff obtained a verdict at the Spring Assizes; the defendant died on the 18th of April; costs were taxed on the 21st; final judgment signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the 1st day of the term. The Court refused to set aside the *fi. fa.* for the irregularity. *Watson v. Maskell*, 810

3. The plaintiff issued two writs, one out of this Court, the other out of the *Exchequer*. The first was never served, on the second the plaintiff declared. The defendant pleaded to the second action another action pending for the same cause in this Court. The plaintiff replied *nul tiel* record, and served the defendant with a rule to produce. The defendant made up a roll from the *præcipe* on the file of this Court. The Court directed it to be cancelled, with costs. *Kirby v. Siggers*, 813

4. The defendant was detained on a *pluries capias* having a blank left for his place of residence, after a *capias* and *alias* describing him as of *C. Street*. The Court set aside the writ and proceedings. *Roberts v. Wedderburne, Bart.* 816

SET-OFF OF COSTS.

See COSTS, 23—LIEN, 2.

SET-OFF OF JUDGMENT.

See LIEN, 2.

The amount of a verdict recovered

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cannot be set off against the amount of a judgment. *Jones v. Garrick*, 157

SET-OFF (PLEA OF.)

Where the general issue and the Statute of Limitations were pleaded together with notice of set-off, it was held, that, under the 2 *Geo. 2*, c. 12, a set-off could not be given in evidence, but that it ought to have been pleaded. *Duncan v. Grant*, 683

SET-OFF OF VERDICTS.

See LIEN, 3.

Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favour, and in the other the plaintiff obtained a verdict with damages, the Court refused to stay proceedings in the first action until a motion for a new trial in the other was disposed of, in order that the damages and costs in the action might be set-off against the costs of the other. *Johnson v. Lakeman*, 646

SHAM BAIL.

See ERROR, 1.

SHAM PLEADINGS.

See FRIVOLOUS DEMURRER, 1, 2—JUDGMENT RECOVERED.

Where a defendant, two days before the end of a term, demurs to a declaration, for the purpose of gaining time, the Court will allow the demurrer to be set down for argument on the last day of the term, and the defendant will not be allowed to withdraw the demurrer and plead the general issue. *Wilson v. Tucker*, 83

SHERIFF.

See ATTACHMENT, 3, 13—INTERPLEADER ACT, 22—STAYING PROCEEDINGS, 2, 5—WARRANT, 1.

1. The Court will not try, on affidavits, whether the return made by a sheriff to a writ is false, even

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though a strong case is made out shewing fraud and collusion, but the party must resort to his remedy by action. *Goubot v. De Crouy*, 86

2. Where a sheriff has taken only one surety to the bail-bond, the Court will set aside an attachment against him for not bringing in the body on payment of costs, at the instance of the bail, though it would not do so on his own application. *Rex v. Middlesex (Sheriff)*, 140

3. In an action by a landlord against the sheriff, the Court refused to allow the proceeds of the sale to be paid into Court with the costs of the action, though it was sworn that the sale was regularly conducted. *Groombridge v. Fletcher*, 353

4. If the sheriff is required by a Judge's order to bring in the body in vacation, and he does not obey it in due time, but, before an attachment is obtained, the defendant is rendered, the contempt is not purged, and he is still liable to an attachment. The Court will, however, set it aside, on payment of costs, and not order it to stand as a security where the plaintiff has not lost a trial. *Rex v. Middlesex (Sheriff)*, 432

5. The defendant as well as the plaintiff may rule the sheriff to return the writ. *France v. Clarkson*, 532

6. Although there is strong reason to believe that a *fi. fa.* had been issued in order to defraud the executors of a *bond fide* creditor, and that the sheriff is a party to the fraud, the Court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the *bond fide* creditor, but the question of fraud must be tried by a jury. *Barber v. Mitchell*, 574

7. If a sheriff does not indorse on the *capias* the day of its execution pursuant to 4 *Reg. Gen. M. T.* 3 *Will.* 4, the remedy is, to require him to amend his return, and make

compensation to the plaintiff for damages accruing through his neglect. *Moore v. Thomas*, 760

SHERIFF'S RETURN.

See SHERIFF, 7.

Where a defendant has been rescued from a bailiff, the sheriff may return the rescue as from his bailiff, and not from himself. *Gobbey v. Dewes*, 747

SIGNING SUMMONS.

See SUMMONS, 7.

SIMILITER.

See JUDGE'S AWARD IN CASE OF A NONSUIT, 19, 20, 22.

SMALL DEBTOR.

1. Upon a motion to discharge a prisoner who has been in custody twelve months for a debt under 20*l.*, the Court has no power to order cause to be shewn at chambers.

Notice ought to be given of such a motion; otherwise, only a rule nisi will be granted in the first instance. *Jones v. Fitzaddams*, 111

2. Under the 48 *Geo.* 3, c. 123, a prisoner is not entitled to his discharge, after remaining in execution twelve months, if the debt exceeds 20*l.*, although the excess consists of interest only, which has accrued after action brought. *Cooper v. Bliss*, 749

SPECIAL CASE.

See AWARD, 5—6 *REG. GEN. H.* 4 *WILL.* 4, p. 305.

Where a special case is reserved, the Court cannot turn the special case into a special verdict, unless there is a power expressly reserved for that purpose. *Canterbury (Archb.) v. Robertson*, 76

SPECIAL JURY.

See JUDGE'S ORDER, 1.

SPECIAL VERDICT.

See SPECIAL CASE, 1.

STAMP.

See COGNOVIT, 2—RELEASE, 2.

STAYING PROCEEDINGS.

See ATTORNEY, 32—BAIL-BOND, 1, 3
—COSTS OF THE DAY, 2—INDORSER
(ACTION AGAINST), 1—SECOND AC-
TION, 2 —SET-OFF OF VERDICTS,
1—SUMMONS, 6—WAIVER, 4.

1. An action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that the attorney had been guilty of gross negligence, and then the attorney brought an action for his bill of costs, the Court refused to interfere to stay proceedings in the latter action.

Smith v. Rolt, 62

2. In an action against the sheriff, by assignees of a bankrupt, for seizing and selling the bankrupt's goods, the Court will not interfere in a summary way to stay proceedings, on the sheriff's paying into Court the sum for which they sold, or restoring them in specie, if there is a dispute about the value of the goods, or if it appears that even on restoring the goods the parties would not be put into as good a situation as they were in before, especially if the sheriff might have applied to the Court under the Interpleader Act. *Gibson v. Humphrey*,

68

3. The Court will not stay proceedings in an action for a debt, though it clearly appears by affidavit that there is no debt due. *Smith v. Curtis*,

223

4. If the plaintiff indorses on the writ a larger debt than is due, by which the defendant is misled, and prevented from settling the action, the Court will stay the proceedings, on payment of the real debt, with the costs of the writ only; but the application must be made promptly after the particulars are delivered. *Elliston v. Robinson*,

241

5. In an action against a sheriff for a false return, and for an excessive levy, and for not paying over the residue,

the Court refused to allow the sheriff to pay money into Court, with costs, though it appeared that the sheriff had by mistake retained money to pay duty to the Crown, but which was subsequently discovered to have been paid, and had also made charges for possession, and other charges usually made, but in strictness not allowable. *Woodgate v. Baldock*,

256

6. One partner may use the names of his copartners in legal proceedings, and they cannot stay proceedings; but the partners who object have a right to be indemnified against the costs. *Whitehead v. Hughes*,

258

7. Where an action was brought in the name of husband and wife, without the authority of the husband, the Court, on application, ordered proceedings to be stayed until an indemnity was given to the husband. *Morgan v. Thomas*,

332

8. A motion to stay proceedings in a second ejectment till the costs of a former one had been paid:—*Held*, to be in time, though a term had elapsed since the action was commenced and notice of trial had been given. *Doe d. Green v. Packer*,

373

9. A summons to plead several matters is a stay of proceedings, if it is returnable at the time the Judgment Office opens on the day after the time for pleading expires. *Wells v. Secret*,

447

10. In the *King's Bench* a rule nisi for setting aside proceedings for irregularity may be drawn up with a stay of proceedings, although notice of motion has not been given. *Stratton v. Regan*,

585

STRIKING NAME OUT OF DECLARATION.

See TRUSTEE, 2.

SUBPENA.

See ATTACHMENT, 5.

A subpoena duces tecum without

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being *ad testificandum* also, held good; and the party is bound to obey it, by producing the document, and is not thereby made a witness. *Evans v. Moseley*, 364

SUMMARY JURISDICTION.

See ATTORNEY, 6, 8, 15, 16, 18, 23, 24, 26, 29—ATTORNEY AND AGENT, 1, 3—SHERIFF, 6.

SUMMONS.

See APPEARANCE, 1—DECLARATION, 2—SERVICE OF PROCESS, 1—STAYING PROCEEDINGS, 9—VARIANCE, 3.

1. Where the plaintiff took an assignment of the bail-bond on the 11th, and issued a writ against the bail on the same day, the bail-bond not being forfeited till the 11th, but the writ against the bail was not served till the 11th—the Court set aside the proceedings on the bail-bond as having been commenced too early; for the summons is now the commencement of the action, and that is reckoned from the time the writ is sued out, and not when it is served.

The rules of Court issued before the Uniformity of Process Act passed, do not apply to proceedings under that act. *Alston v. Underhill*, 26

2. Where there are several defendants, the word "you" in the notice in a summons, that the plaintiff may enter an appearance for the defendants if they do not appear, is to be construed distributively.

On a summons, the name of the attorney suing it out is sufficiently stated by indorsing the name of the firm to which he belongs.

The residence of an attorney is sufficiently described by the indorsement, "*Gray's Inn, London.*" *Engleheart v. Eyre*, 145

3. The omission of the name of the chief clerk of the *King's Bench*, on a writ of summons, is not an irregularity. *Wilson v. Joy*, 182

SUPERSEDEAS.

4. "Libel" is a sufficient description of the form of action in a writ of summons. *Pell v. Jackson*, 445

5. "Slander" is a sufficient description of the form of action in a writ of summons. *Davies v. Parker*, 537

6. The name of one county being substituted for another in a writ of summons without resealing, the proceedings were set aside without costs, although the defendant had obtained an order to stay proceedings on payment of debt and costs. *Siggers v. Sansom*, 745

7. The filacer need not sign a writ of summons, if the seal of the Court is impressed upon it. *Burt v. Jackson*, 747

SUNDAY.

See NOTICE OF TRIAL, 1.

SUPERSEDEAS.

See ERROR, 4—PRISONER, 3—9
REG. GEN. H. T. 4 WILL. 4,
(PRACTICE RULES), p. 306.

1. If a defendant is allowed to remain in custody two terms after judgment, without being charged in execution, he thereby becomes super-sedeable, and the plaintiff cannot charge him in execution, but must first bring an action on the judgment, and the defendant can then be taken on a *ca. sa.* issued in the second action. *Melton v. Hewitt*, 71

2. Where a prisoner petitioned the Insolvent Court to be discharged, but took no further steps, either by filing his schedule within fourteen days, or giving notice to the plaintiff, and the plaintiff did not declare against him within two terms:—*Held*, that he was not entitled to be discharged out of custody. *Molyneux v. Browne*, 84

3. If a plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with 1

Reg. Gen. H. 2 Will. 4, s. 85, and the defendant is not supersedeable. Myers, Knt., v. Cooper, 423

4. If a trial takes place in vacation, and the defendant surrenders after it, and before the following term, he ought to be charged in execution in that term, or he will be supersedeable under 1 *Reg. Gen. H. T. 2 Will. 4, s. 85. Borer v. Baker,* 608

TAXATION.

See ARBITRATION, 1—ATTACHMENT, 8—ATTORNEY, 1—ATTORNEY'S BILL, 2—ATTORNEY AND CLIENT, 1—COSTS, 7—DIRECTIONS TO TAXING OFFICERS, p. 489—MASTER'S DIRECTIONS, 1, 2, 3, 4, 5—MISNOMER, 1—17 REG. GEN. H. T. 4 WILL. 4, p. 308.

1. Affidavits used before the Master on the taxation of costs cannot be read on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is not sufficient. *Cliffe v. Prosser,* 21

2. A client took out a summons to tax an attorney's bill, but the attorney having become bankrupt, the Judge refused to make an order for that purpose: the assignees then commenced an action, and the defendant having obtained an order to tax on the usual terms of paying the debt and costs, the Master took off more than a sixth on taxation, but allowed to the plaintiff the costs of taxation: however, the Court ordered the Master to review the taxation by disallowing the costs. *Featherstonehaugh v. Reece,* 30

3. No objections to the Master's taxation can be entertained unless they are specified in the affidavit or rule. *Aliven v. Furnival,* 49

4. Where, by the practice of the Courts, costs need not be taxed, it is unnecessary to give the notice re-

quired by 12 *Reg. Gen. T. T. 1 Will. 4. Griffiths v. Liversedge,* 143

5. Although the Master, on taxation, has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary. *Heald v. Hall,* 163

6. Where an attorney brings an action to recover the amount of his bill, and after action brought his bill is taxed, he is not bound to pay the costs of taxation, unless it appears that the action was brought to avoid those costs. *Toomer v. Fuller,* 195

7. Several persons having agreed to share with a plaintiff the expenses of an action, and he, having paid the attorney's bill, brought an action for contribution against one of those persons, the Court, on his application, ordered the attorney's bill to be taxed, though it had been paid, and the defendant in this action had paid his full share of the money into Court. *Grover v. Heath,* 285

8. If, by an alteration in the state of the pleadings, after notice of trial, certain witnesses are unnecessary, the party who subpoenaed them must make reasonable efforts to prevent their attendance, or their expenses will not be allowed on taxation. *Allport v. Baldwin,* 599

9. Where an action was brought to recover an attorney's bill of costs for several distinct businesses, as to some part of which the client disputed his liability on account of the negligence of the attorney, but the other part was not disputed; the Court refused to order the Master to tax the disputed part of the bill separately from the rest, a Judge's order to tax having been before obtained on the usual terms. *Jones v. Roberts,* 656

10. A motion to review the Master's taxation must be supported by an affidavit that the Master has made his *allocatur*. *Cleaver v. Hargrave,* 689

TENDER.

See PAYMENT INTO COURT, 4.

The defendant cannot transfer money deposited in Court in lieu of bail to a payment under a plea of tender. *Stultz v. Heneage*, 806

TESTE OF WRIT.

1. If a defendant dies in execution, a *fi. fa.* tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, will support a *testatum* issued under the 21 *Jac.* 1, c. 24, s. 2, into a foreign county. *Farncombe v. Kent*, 464

2. A *fi. fa.* on a judgment signed after a defendant's death, in vacation, may be tested on the last day of the preceding term, notwithstanding the 3 & 4 *Will.* 4, c. 67, s. 2. *Brocher v. Pond*, 472

3. If a *ca. sa.* is tested of a term previous to the judgment, or when issued under the statute 1 *Will.* 4, c. 7, s. 13, if not tested on the day it issues, it is irregular, but the Court will permit the teste to be amended (on payment of costs) even as against the bail. *Englehart v. Dunbar*, 202

TIME.

See NOTICE OF TRIAL, 1, 4—SUMMONS, 1.

An order for seven days' time to plead was obtained on *May* 15th; on the 22nd, pleas were delivered, but irregular in several respects, and, on the evening of that day, the plaintiff signed judgment as for want of a plea; the Court set aside the judgment as having been signed too early. *Pepperell v. Burrell*, 674

TIME FOR PLEADING.

Where three months' time to plead are given generally, they are to be reckoned by lunar months, and not calendar months. *Soper v. Curtis*, 237

TRIAL BY PROVISIO.

See JUDGMENT AS IN CASE OF A NON-SUIT, 13, 24.

TRUSTEE.

See PRODUCTION OF DOCUMENTS, 1.

1. If there is a dispute as to the inheritance, the Court will not compel the trustee of an outstanding term attending the inheritance to lend his name to either party in an action of ejectment. *Doe d. Prosser v. King*, 580

2. If a creditor becomes trustee under a composition deed, but does not execute it, and an action is brought in his name and that of another trustee without his consent, unless there is a suggestion of fraud, the Court will not strike his name out of the declaration. *Emery v. Mucklow*, 735

UNAUTHORIZED ACTION.

See STAYING PROCEEDINGS, 7.

UNDEFENDED CAUSE.

See NEW TRIAL, 3.

UNDER-SHERIFF.

See WRIT OF TRIAL, 8.

UNIFORMITY OF PROCESS ACT.

See CAPIAS—CONTINUANCE OF PROCESS, 1—DEMAND OF PLEA, 1—DETAINDER—IMPARLANCE, 1—LIMITATION OF ACTIONS, 1—MEMBER OF PARLIAMENT, 1—PRISONER, 4—SUMMONS—VENUE, 10.

1. Since the new Process Act, the Court having no jurisdiction by bill, it is demurrable to state that the plaintiff commenced his suit by bill. *Darling v. Gurney*, 101

2. A defendant must justify as well as put in bail in vacation, according to the 2 *Will.* 4, c. 39, s. 11, though

he is arrested between the 10th of August and the 24th of October. *The King v. The Sheriff of Middlesex*, 286

3. Since the Uniformity of Process Act, an attorney sued with an unprivileged person does not lose his own privilege, and cannot be arrested. *Keep v. Biggs*, 278

VACANT POSSESSION.

See EJECTMENT, 10, 15, 25.

The usual entry in cases of vacant possession will in certain cases be dispensed with. *Doe d. Frith v. Roe*, 481

VACATION.

See JUDGE'S ORDER, 1—LACHES, 2—RULE TO PLEAD, 1—SHERIFF, 4—TESTE OF WRIT, 2—UNIFORMITY OF PROCESS ACT, 2.

VARIANCE.

See CAPIAS, 1, 5, 13—DEMURRER, 3.

1. Though the particulars of demand vary from the evidence which the plaintiff adduces, yet, if the defendant appears and defends, and is not misled by them, the variance is no ground for nonsuiting the plaintiff. *Green v. Clark*, 18

2. Where the writ was in trespass, and the declaration trespass on the case, the Court set aside the declaration for irregularity. *Thompson v. Dicus*, 93

3. Where the writ is irregular, as being in "trespass," and yet claiming a debt, and the defendant neglects to move to set it aside within proper time, yet, if it is followed by a declaration varying from the writ, as in *assumpsit*, the Court will set aside both declaration and writ. *Edwards v. Dignam*, 240

4. Upon the trial of an issue, in an action of debt on bond before the sheriff, under the Writ of Trial Act,

a variance appeared between the bond as stated in the declaration and the bond produced in evidence: the penalty in one being 260*l.*, and the penalty in the other 200*l.*; but the sheriff refused to nonsuit, and the plaintiff obtained a verdict: the Court, however, refused a rule for a new trial, on the ground of the variance, though no amendment had been made, nor the facts found specially, as directed by the 24th section. *Hill v. Salter*, 380

5. A writ being general and the declaration special, held to be no ground for setting them aside as irregular.

Where two of three parties to a bail-bond were sued jointly, held to be no irregularity. *Knowles v. Johnson*, 653

VENUE.

See 8 REG. GEN. H. T. 4 WILL. 4, (PLEADING RULES), p. 318.

1. After time to plead on the usual terms, the Court will not allow the venue to be changed, except on special grounds. Merely swearing that the cause of action arose, and the witnesses live in another county, is not sufficient. *Tonks v. Fisher*, 22

2. When, on account of political excitement and other circumstances, a fair trial cannot be had in the county where the venue is laid, the defendant can change the venue without paying costs, for they are properly costs in the cause. *Lewis v. Morris*, 60

3. Where the plaintiff declared upon a written contract to repay money borrowed, and to secure it by a mortgage and a deposit of deeds, but it was not stamped, the Court allowed the defendant to change the venue. *Slade v. Trewe*, 65

4. The venue may be changed after plea, where, on account of the witnesses residing in a different county

from that in which the venue is laid, it will be more convenient to try it in the former county.

The costs of the rule, which was opposed by the plaintiff, were ordered to be costs in the cause. If the rule had not been opposed, the defendant would have had to pay them. *Cotterill v. Dixon*, 112

5. The Court will waive the strict rule as to change of venue in favour of liberty. *Keys v. Smith*, 210

6. It is not of itself a sufficient objection to an affidavit for changing the venue, that it is made by the attorney in the cause, and not by the defendant; but, *semble*, that, if defendant is in the country, it ought to be made by him. *Biddell v. Smith*, 219

7. In an action on a bill of exchange, the defendant is too late to change the venue after an order for time on the usual terms and an undertaking to try at the Sittings, though it is sworn that all the witnesses reside in the county to which the venue is required to be moved. *Haythorn v. Bush*, 240

8. In an action on a deed, the venue may be changed under special circumstances, though an undertaking to try at the Sittings has been given; and an affidavit shewing that there was a good defence on the merits was held equivalent to a positive affidavit that there was such a defence. *Johnson v. Nevison*, 260

9. The venue cannot be changed in an indictment for conspiracy, until issue is joined. *Rex v. Forbes*, 440

10. An attorney is entitled to retain his venue in *Middlesex*, notwithstanding the Uniformity of Process Act, and his not having entered his certificate. *Partington v. Woodcock*, 550

11. If a defendant moves to change the venue as of right, it is not sufficient to swear that the cause of action

did not arise in the county stated in the declaration, and that it will be inconvenient for him to try there. He must make the ordinary affidavit, shewing in which county the cause of action *did* arise. *Palmer v. Terry*, 566

12. In an action for a libel published in a country local newspaper, the Court allowed the venue to be charged upon a special affidavit. *Robson v. Blackwell*, 645

13. It is not a ground of special demurrer that a venue is inserted in a pleading, contrary to the late rules in pleading. *Harper v. Chumneys*, 680

14. In covenant on a farming lease of land in *Essex*, for breaches of covenants relating to the cultivation of the land, the Court refused to allow the venue to be changed from *Middlesex* to *Essex* before plea pleaded. *Bohrs v. Sessions*, 699

15. The affidavit whereon to change the venue, must not only state that the cause of action arose in the county to which the removal is prayed, but also that it did not arise elsewhere. *Jones v. Pearce*, 54

VERDICT.

See COSTS, 7—NOTICE OF TRIAL, 3
—SETTING OFF JUDGMENTS, 1—
WRIT OF TRIAL, 3.

VEXATIOUS PROCEEDINGS.

See SECOND ACTION, 1.

VOLUNTARY PAYMENT.

See SETTING ASIDE PROCEEDINGS (FOR
IRREGULARITY), 2.

WAIVER.

See AFFIDAVIT, 11, 12—AFFIDAVIT
OF DEBT, 10—ATTORNEY, 9—
PRISONER, 3—TAXATION, 3—VA-
RIANCE, 1.

1. There can be no waiver unless with a knowledge of the irregularity. *Cox v. Tullock*, 47

WAIVER.

2. A defendant, by consenting to withdraw a juror, waives any supposed right he may have to claim his costs from the attorney for the plaintiff, on the ground of the action being brought without consent of the latter. *Hammond v. Thorpe*, 721

3. If a party taxes the bill of an attorney for costs due from a third person and pays that bill, he cannot afterwards recover the amount without shewing the payment to have been made through ignorance or fraud; and if an action be brought, the court will stay proceedings. *Kendall v. Allen*, 788

4. Where the attornies of two parties agree to be bound by the judgment of the court, on demurrer neither party can bring a writ of error to that judgment. *Brown v. Lord Granville*, 796

WARRANT.

It is not necessary that the sheriff's warrant issued upon a *capias* should specify the court out of which the process issues. *Astley v. Goodjer*, 619

WARRANT OF ATTORNEY.

See EXECUTION, 2—4 REG. GEN. H. T. 4 W. 4, (PLEADING RULES), p. 314.

1. Where a defendant is resident in the *West Indies*, a judgment may be signed against him on a warrant of attorney, if seen alive four months before. *Fursey v. Pilkington*, 452

2. Where the attesting witness to a warrant of attorney is the clerk of the attorney preparing it, the want of his affidavit, on signing judgment, is sufficiently supplied by that of his master verifying the handwriting of his clerk and of the defendant, and stating that the former has absconded and cannot be found. *Young v. Showler*, 556

3. Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of "executors or administrators," the court

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will not allow judgment to be entered up. *Baldwin v. Atkins*, 591

4. Where an attesting witness to an old warrant of attorney is abroad, his affidavit need not be produced. *Taylor v. Leighton*, 746

5. It is necessary to obtain leave of the court to enter up judgment against husband and wife on a warrant of attorney executed by the wife *dum sola*. *Staples v. Purser*, 764

WELSH ATTORNEY.

An attorney of the Court of Great Sessions in *Wales*, who had once been in practice, but had discontinued practising for more than six months before the passing of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, was held not to be entitled to be admitted under that act. *Ex parte Garratt*, 371

WITNESS.

See CROSS-EXAMINATION, 1—MASTER'S DISCRETION, 5—PRIVILEGE FROM ARREST, 2—RELEASE, 2—TAXATION, 8.

1. The court of *Exchequer* has the same power as the court of *King's Bench*, since the 13 *G. 3*, c. 63, s. 44, to issue a *mandamus* or a commission for the examination of witnesses abroad. *Savage v. Binny*, 643

2. Where it is sworn that a witness is in a precarious state of health, and cannot attend the trial with safety, he may be examined before the officer of the court. *Pond v. Dimes*, 730

WITNESS (ABSENCE OF).

See COSTS, 5.

WRIT.

See COMMENCEMENT OF ACTION, 1—DECLARATION, 3,—SHERIFF, 5.

WRIT OF RIGHT.

Where a writ of right is brought to recover land which has been the
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subject of an unsuccessful action of ejectment, the court will not stay the proceedings in the writ of right, until the costs of the ejectment are paid. *Bowyear v. Bowyear*, 206

WRIT OF TRIAL.

See FORM (PLEADING RULES), p. 330

—INDORSEMENT OF VERDICT ON, p.

331—INDORSEMENT OF NONSUIT

ON, p. 331—JUDGMENT (FORM), p.

331—19 REG. GEN. H. T. 4

W. 4, (PRAC. RULES), p. 308—VA-

RIANCE, 4.

1. The act authorizing the sheriff to try issues where the debt or demand does not exceed 20*l.* applies only to debts and pecuniary demands, and not to torts.

Semble, that the sheriff or his deputy has the power to nonsuit. *Watson v. Abbott*, 215

2. The defendant may move for judgment as in case of a nonsuit, as well where the issue is directed to be tried before the sheriff, as where it comes on at the Sittings; but it is too soon to move in the same term in which the default is, and where it does not appear that the notice of trial was countermanded. *Begbie v. Grenville*, 238

3. Where an action is tried before the sheriff, under the Writ of Trial Act, and the jury give 20*l.* for the debt, and 10*s.* for interest, *semble*, that the verdict is bad *quoad* the 10*s.* *Burleigh v. Kingdom*, 351

4. Motions for new trials under the Writ of Trial Act can only be made on an affidavit of the facts, or on the under-sheriff's notes, verified by affidavit; and the Court will not pay the same regard to the notes of the under-sheriff as they do to a Judge's notes of a trial. *Johnson v. Wells*, 352

5. A defendant may obtain judgment as in case of a nonsuit where notice of trial has been given before the sheriff, pursuant to 3 & 4 *Will.* 4,

c. 42, s. 17. *Walls v. Redmayne*, 508

6. If a plaintiff does not proceed within two terms after issue is joined, which issue is directed to be tried before the sheriff under the 3 & 4 *Will.* 4, c. 42, s. 17, the defendant is entitled to judgment as in case of a nonsuit, as in ordinary cases. *Horwood v. Roberts*, 534

7. Where a plaintiff obtains an order under the 3 & 4 *Will.* 4, c. 42, s. 17, for the trial of an issue before the sheriff, the Court will compel him to proceed within a reasonable time. *Mullins v. Bishop*, 557

8. If an under-sheriff refuses to transmit his notes taken on the trial of an issue, the Court will compel him to pay the costs consequent on his refusal. *Metcalf v. Parry*, 589

9. The provisions of the 1 *Will.* 4, c. 7, ss. 2, 4, being extended to proceedings before the sheriff under the 3 & 4 *Will.* 4, c. 42, s. 17, the Court will, in the next term, entertain a motion to vacate and arrest a judgment signed in vacation. *Pyke v. Glendinning*, 611

10. The rule which forbids a motion for a new trial where the amount is under 20*l.*, except for misdirection of the Judge, does not apply to trials before the sheriff, under the 3 & 4 *Will.* 4, c. 42, s. 17.

The absence of a witness is no ground for a new trial, application ought to be made to postpone the trial. *Edwards v. Dignam*, 642

11. On moving for a new trial under the 3 & 4 *Will.* 4, c. 42, s. 17, (the Writ of Trial Act), the proper course is to have the notes of the presiding officer verified by affidavit, without affidavits of the facts. *Grainge v. Shoppe*, 644

12. The Court will allow further time to make a motion for a new trial, if the under-sheriff does not

furnish his notes of the trial in proper time. *Thomas v. Edwards*, 664

13. Upon a trial under the 3 & 4 *Will.* 4, c. 42, the plaintiff, having obtained a verdict, got his costs taxed, and signed judgment on the same day:—*Held*, upon the construction of section 18, that the judgment was regular. *Nicholls v. Chambers*, 693

14. It seems that issues tried before the sheriff are within the rule adopted by the Courts, where the

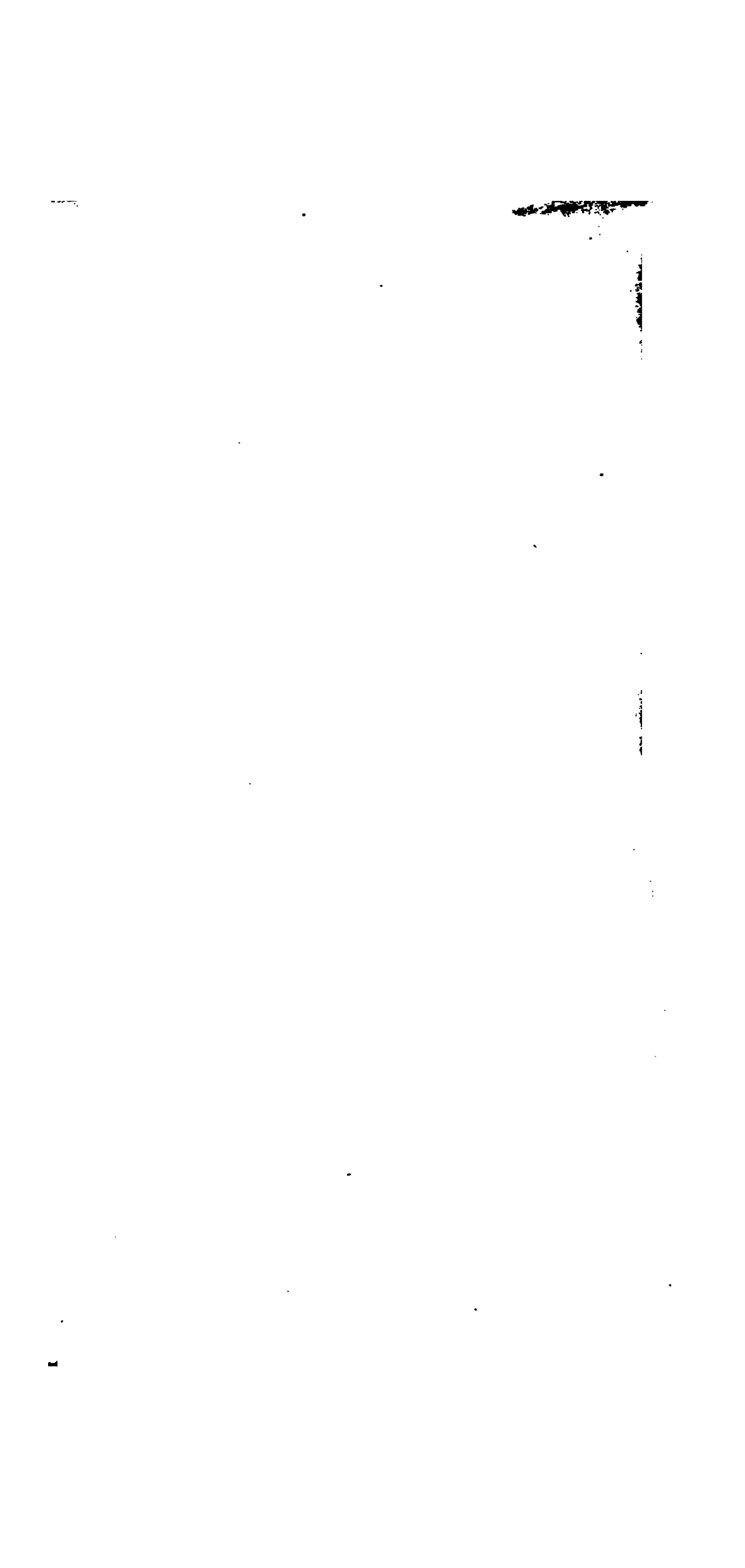
verdict is for less than 20*l.* *Henning v. Samuel*, 766

15. A writ of trial should be directed to the "Judge" of an inferior court of record, although the 3 & 4 *Will.* 4, c. 42, s. 17, only speaks of "sheriff" as the person to whom the writ is to be directed. Where the trial took place before the deputy of a mayor, and it was not shewn that he had no power to appoint a deputy, the Court would not set aside the proceedings. *Clark v. Marner*, 774

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